J M D Anderson

Islamic Law in the Modern World

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Author's Introduction

Praise be to God, and blessings and peace be upon God's Messenger, his Family, Companions, and all who follow his guidance.

The College of Sharia Law and Islamic Studies, University of Qatar, having some thirteen years of practical experience teaching introductory courses in Sharia Law, proposed that a general introduction to Islamic Law be offered to students of other departments. The purpose of this course would be to examine the broad features and general objectives of the Sharia and to outline those qualities that set it apart from the world's other legal systems, particularly those of the Semitic and modern secular traditions. The course would also include a critical assessment of the Sharia's claim to universal and eternal validity, its wide scope of application, and flexibility of interpretation as attested to by revelation, history, practical experience, and the judgment of broad-minded and practical people all over the world.

This book was written for use in such a course. It deals with the effort to apply the Sharia in the contemporary world. The difficulties of doing this are considered together with a number of reasons for the appropriateness of Islamic Law to problems of modern society. The conditions necessary for applying the Sharia in our age are also considered. This is not an introduction to the study of *fiqh* and so the nature and origins of the various currents of opinion, Shafi'i, Hanafi, Maliki and so on, and the rules of jurisprudence, are not a central concern of the book.

It is our hope that this book will contribute to a better understanding of the Sharia as a vibrant and living system of law. A more informed view of the nature and character of Islamic Law is increasingly important to Muslims and non-Muslims alike, especially in a time when more and more people in the Islamic world are calling for its return. May God grant us the wisdom to achieve this goal and guide us to it.

Praise be to God by Whose bounty all righteous deeds are made possible.

Algiers, September 1991

PREFACE

This book is about the Sharia, the Law of Islam, and how that law can come to be cautiously molded by human hands to accommodate society to change. Its author, Dr. Yusuf al-Qaradawi, is a world-class scholar and one of the most outspoken defenders of Islamic law in the Muslim world. A graduate of the world famous al-Azhar University in Cairo, he now teaches at the University of Qatar. This book was originally written for undergraduate students who are not specializing in Islamic studies, and addresses several important points about Sharia law, such as its claim to universal and eternal validity, its scope of application, and its flexibility as a system. The author is keen to disprove the claims of Arab secularists and modernists that the Sharia is a medieval system of law, fundamentally ill suited to modern times and impossible to apply.

Unless otherwise indicated in the notes, English translations of the Holy Qur'an were taken from a draft copy of Dr. Daoud William Peachy's recent revision of Muhammad Marmaduke Pickthall's *Meaning of the Glorious Qur'an.*

Complete sources for hadiths are listed in the notes. Translations of hadiths in the book were based on published translations, details of which may be found in the bibliography.

In order to keep distractions to a minimum, detailed transliteration of Arabic words was confined to the notes and bibliography. The spelling, Qur'an, has been followed throughout. The spellings Makkah and Madinah replace the older forms, Mecca and Medina. Terminal *tah marbouta* has not been represented by an *h*, as is sometimes done, *viz.* Sharia for Shariah and sunna for sunnah.

to it, could not be expected to conduct their political affairs without any reference to their faith. When we consider that it is in fact the Sharia that governs their sleeping, eating and dressing, we see that Islamic Law, though deprived of a political role in the modern world, is still a reality for millions. So long as it is a reality for them, their demands that political leaders take account of it should not surprise us.

The time when religion played a decisive role in Western society and politics is now beyond living memory. Yet, only two hundred years ago religion was still important enough for the framers of the United States Constitution to devote most of the First Amendment to religious freedom. The debate over whether the Constitution protects freedom of religion or freedom from religion might surprise them, just as it surprises many Americans today.

As a Western phenomenon, secularism is naturally colored by the experience of the West. In recent history this has been an experience of breaking bonds: bonds of ignorance, bonds of poverty, and bonds of morality and faith. Not so long ago, Karl Marx could identify religion as one of the greatest social evils facing humanity. What Marx said was nothing new: the struggle between political and religious authority is truly ancient, and has been a salient feature of political life in the Muslim East, as it has in the Christian West, for centuries.

Despite this tension, the disestablishment of religion has never been an option in the Muslim world. Throughout the ages Muslim rulers have attempted to control the *ulema*, the loosely defined class of religious scholars, and to internalize religious institutions. But the scholars have always guarded their independence closely and resisted attempts by political leaders compromise them or misuse their authority. Just as often, scholars have sought to restrain political excesses with appeals to respect and implement the Sharia.

Islam achieves a symbiosis between heaven and earth. Divinely revealed, it is in the world and of it. Muslims see the overthrow of religion as the beginning of the descent into tyranny and oppression, both of which are inevitable results of spiritual confusion and doctrinal chaos.

It is our hope that more complete knowledge of Islam and its law will lead to a deeper understanding our faith: of one of the world's most widespread and most dynamic religions.

May the blessings and peace of Allah be upon our Prophet, Muhammad, and upon his family and companions.

Zaid Abdul Mohsin Al Husain
Secretary General
King Faisal Center for Research
And Islamic Studies, Riyadh
1417/1997

1

THE SHARIA AND ITS SOURCES

The Arabic word *Sharia* means whatever God has established for His worshippers to perform as an act of faith, or whatever He has laid down as a part of religion such as fasting, prayer, pilgrimage, regular charity, and other good deeds. The root of this word originally meant to "explain" or to "clarify" and is related to the word for a place where there is a spring that provides abundant water year round. The word Sharia, and closely related words, occur only five times in the Holy Qur'an. In one place a closely related word is used in the sense of set or determine.

> He has *set* and explained for you some of the religion in which He instructed Noah, what We revealed to you (Muhammad), and in which We instructed Abraham, Moses and Jesus... (42:13).

God uses the same word when He criticizes the idol worshippers for choosing the laws of their religion by themselves and asks rhetorically, "Or do they have partners (of God) who have *set* them something in religion that God did not allow?" (42:21). These verses were both revealed at Makkah.

Sometimes the word *shari'ah* means "path" or "way." It occurs in this sense in the verse "Now have We set you (O Muhammad) on a *clear path* of (Our) command..." (45:18).[1] This verse was revealed at Makkah before any legislation, which is confined to the Madinan

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1. Further explanation is to be found in al-Tabari, Muhammad b. Jarir (d. 380/1000), *Jâmi' al-bayân fi tafsir al-Qur'ân*, IX (Beirut: 1978), 88: "Ibn Abbas said [this] means, 'We have sent you [Muhammad] to guide others to God and to explain His commands to them . . .'; Qatada said the word *sharia* means the obligations Muslims bear, the sanctions that enforce them, the things we are commanded to do, and the things we are commanded to stop doing...; Ibn Zaid once said it means the divine law and then he read [the verse], 'He has set and explained for you some of the religion in which He instructed Noah, what We revealed to you [Muhammad]...' Zaid said Noah was the first of them and Muhammad is the last of them." *O.J.*

verses, was sent down; it contains the only mention of the word *sharî'ah* in the Holy Qur'an.[2]

The Sharia is the totality of firm judgments revealed by God in the Qur'an and Sunna, and whatever is derived from these judgments through jurisprudence.[3] Jurisprudence is the method of discovering detailed legal provisions from specific evidence drawn from the Qur'an and the Sunna. The jurist must exercise reflection and careful thought to solve problems whose solutions are not immediately apparent.[4] While the Sharia is the goal, jurisprudence is the road to it.

A book of jurisprudence is really a collection of legal rulings. These can be divided into two categories. The first of these contains all rulings explicitly spelled out in the Qur'an and the Sunna. While this is the more important category, since it provides the foundation of the Shaṛia, it is the smaller of the two. No one can say that the rulings in this category are not part of the Sharia. The second category consists of rulings that rely exclusively upon the discretion of jurists. This category also includes legal precedents set by jurists using methods like analogy, consideration of public interest, juristic preference, consideration of custom and so on. Since the passing of such rulings is the main activity of jurists, these account for the majority of reported legal rulings.

Writers sometimes disagree about the relationship between the Sharia and Islamic jurisprudence and say that these are two absolutely different things. Their premise that the Sharia is divine and jurisprudence is man-made is mistaken since jurisprudence stands in direct relation to the Sharia and in truth describes it. The Sharia does not exist in a vacuum. Jurisprudence is an important component of it and the tool by which the Sharia deals with new issues using methods that

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2. Compare the Makkan verses above to this verse revealed at Madinah: "For each We have appointed a (*shirᶜa*) divine law and a course (of action)" (5:48). [According to al-Tabarî, X, 384, "The Almighty said in His revelation, 'For each we have appointed a divine law (*shirᶜat*).' The Arabic word *al-shirᶜa* and *al-sharîᶜa* both originally mean a spring, a place where water emerges from the earth and may be had without digging or letting down buckets. For this reason the sources of Islam were called *sharâ'iᶜ, since its people find their source in it." OJ.*]

3. The word *fiqh* also means to deduce the unknown from what is known. This is a more specific term than *ᶜilm*, which means knowledge.

4. al-Jurjânî, ʿAlî b. Muhammad b. ᶜAlî (d. 816/1413), *al-Taᶜârîfât*, ed. ᶜAbd al-Rahmân al-Amîra (Beirut: ᶜÂlam al-Kutub, n.d.), 216.

are compatible with its principles and objectives. Rulings arrived at by the discretion of jurists are part of the Sharia.

To dismiss jurisprudence as the product of imperfect human minds is unacceptable since the logical conclusion of this is the rejection of the Sharia itself. Nevertheless, it is possible to improve the resources of jurisprudence. Some of these improvements have to do with form, such as indexing and codification. Others have to do with substance, such as the revival of juristic discretion or *ijtihad*. Juristic discretion can be a selective process where one legal opinion is preferred to another because of the strength of its evidence, but it can also be used creatively to establish the position of the Sharia on completely new issues.

According to the dictionary, law is "the body of formal or customary rules which a state or community recognizes as binding on its members."[5] This body of rules forms the basis by which judges are guided. The word "law" refers to the rules that men have enacted to govern the community and to regulate personal, national, and international relations. The Sharia is revealed by God but law is enacted by man. Sometimes the word law has the sense of a set of codes that deal with a particular problem such as drug abuse. It can also mean the rules and regulations people use to settle their disputes.

The oldest known set of laws, called the Laws of Hammurabi, was used in Babylon some 4000 years ago.[6] Roman law has had a more profound impact on modern times because of its relationship to Western legal traditions. Western law, in turn, became the basis of legal systems throughout the Islamic world during the colonial era. Roman law had no direct influence on Islamic jurisprudence in classical times.

Abdul Qadir 'Awda, a lawyer who also has experience as a Muslim jurist, explains that law is largely the product of society. It changes and develops with the society it serves. Indeed, society often sets standards to which the law must ultimately conform.The Sharia, on the other hand, is not the product of the Muslim community. It was revealed by Almighty God to His Prophet, Muhammad, upon whom be peace,[7] and came to us in a complete form. Here, it is society that

5. Little *et al.*, *The Shorter Oxford English Dictionary*, (Oxford: 1973), 1185.

6. Hammurabi was a king of Babylon who ruled from 1792 to 1750 BCE. *O.J.*

7. The Prophet's name is usually followed by some form of supplicaiton for him. Readers are reminded to observe this sunna. *OJ.*

must conform to revealed law. The Sharia cannot be changed to follow the fashion of the times or the will of the people. But while it is unchangeable, it is not rigid. Abudl Qadir 'Awda explains,

> The immutability of the Sharia depends upon two characteristics. The first is that its general principles are universally valid. The second is that it is flexible enough to accommodate changing social needs. These are the most important aspects that set it apart from all other systems of law.[8]

The Sharia is meant to be the foundation of a unique Muslim nation, a nation whose mission is to guide humanity. The Sharia cares for the community as well as for the individual and aims to balance their conflicting interests. It is from this perspective alone that we will begin to understand the real meaning of the phrase *Dar al-Islam*, the single and indivisible community of faith whose preservation and defense are the duty of every Muslim. The office of the Caliphate is proof that the Muslims are a single political community. Indeed, one of the definitions of this office is that its holder is the leader of all the Muslims. There can only be one legitimate Caliph. A single community can have but one leader. Obedience is owed to him in all matters sanctioned by the Sharia.

Naturally, the Sharia aims to establish a social order of the highest calibre based upon certain fundamental ideals. These have been outlined in the Qur'an and the Sunna and include justice, brotherhood, solidarity, freedom, and dignity. To illustrate this, we will consider one of these in more detail.

The Qur'an has emphasized that the primary objective of all the Prophets is the establishment of justice on earth. "We sent Our messengers with clear proofs, and sent down with them the Book and the Scales for mankind to stand fairly" (57:25). According to this, the prophets were sent so that men can rule justly. God says, "Say, 'My Lord orders fairness...'" (7:29), and also, "God orders justice..." (16:90).

The justice that the Qur'an commands means being fair to yourself by observing God's limits.

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8. ʿAbd al-Qâdir ʿAwda, *al-Tashrîʿ al-janâ'î al-islâmî muqârinan bil-qanûn al-wadʿî*, (Beirut: Mu'asasah al-Risalâ, 1995), 14-23.

It means being fair to God by worshipping Him, seeking His help and not associating anything with him. It means being fair to others and avoiding hatred and favoritism. It means being fair in word. It means being fair when bearing witness and being fair in judgment. Finally, it means being fair to your family.[9] Justice is due to all people regardless of religion since by its nature justice is absolute and cannot apply differently to different people. The Holy Qur'an tells us,

> God does not forbid you from showing kindness and dealing justly with those who have not fought you about religion and have not driven you out of your homes, for God loves just dealers (60:8).

Justice is a constant principle, regardless of circumstances, even in times of war. God says, "Fight in the way of God against those who fight against you, but do not go beyond the limits. God does not love those who go beyond the limits" (2:190).

Absolute justice is one of God's divine qualities. It is not possible to identify Him with injustice since this is to contradict a quality of divinity. A careful study of the Sharia will reveal that it encourages

9. On being fair to yourself by observing God's limits: "As for whoever steps beyond God's limits, he wrongs his soul" (65:1); On being fair to God: "Don't associate partners with God. Associating partners with God is a great wrong" (31:13); On hatred and favoritism: "Do not let hatred of any people drive you to deal unjustly. Deal justly, that is nearer to fearing God" (5:8), and "You who believe, stand firm in justice as witnesses for God, even if it is against yourselves, parents or relatives..." (4:135); On being fair in word: "If you speak, be just, even if there is a relative..." (4:135); On being fair in witness: "Call to witness two just men among you, and keep your testimony upright for God" (65:2); On being fair in judgement: "God commands you..., if you judge between people, to judge justly' (4:58); The Prophet said, "God will give shade to seven on the Day when there will be no shade but His: (1) a just ruler, (2) a youth who has been brought up in the worship of God, (3) a man whose heart is attached to the mosques, (4) two people who love each other only for God's sake and they meet and part in God's cause only, (5) a man who refuses the call of a charming woman of noble birth for illicit intercourse with her and says, 'I am afraid of God,' (6) a person who gives charitable gifts so secretly that his left hand does not know what his right hand has given, (7) and a person who remembers God in seclusion and his eyes are then flooded with tears." Al-Bukhârî, Muhammad b. Ismâ'îl b. Ibrâhîm b. al-Mughîrah b. Bardizbah, al-Ju'fî, (d. 256/870), *Sahîh*, I (10/36) (Istanbul: Matkabat al-Islâmîyah, 1981), 160; On being fair to your family; "Marry women who seem good to you, two or three or four. And if you fear that you cannot be just then (only) one" (4:3). — The justice commanded here is the apparent justice that human beings can afford, rather than the emotional justice over which no man has a hand. This is what is meant by, "You will not be able to deal equally between (your) wives, however much you so wish. But do not turn altogether away (from one), leaving her hanging. If you do good and fear God, then God is Forgiving, Merciful" (4:129). The justice that is impossible according to the Holy Qur'an is the absolute justice that covers both the known and the unknown. It is prohibited to show an obvious favoritism to one wife while hurting another, though what is unavoidable is tolerated in view of human weakness.

justice in all areas of human endeavor: in trade and exchanges, in marriage and divorce, in public order and policy, in relations between individuals whether within the context of the family, society or political culture, and in relations between sovereign states. It is possible, therefore, to view the concept of justice in the Sharia in terms of three domains: politics, economics, and international affairs.

Political justice means that all people are equal before the law. The Prophet said, "If Fatimah, the daughter of Mohammed, had stolen anything, I would chop off her hand."[10] Economic justice demands distribution of wealth in such a way that it will not be concentrated in only a few hands. The weak should be given precedence over the others in the distribution of natural resources such as oil, gas and so on, "That it may not become a commodity between the rich among you" (59:7). The same principle applies to equal opportunities in education and employment. In international affairs, relations between Islamic and non-Islamic states must be characterized by justice, both in times of peace and in times of war. The Sharia requires respect for treaties, non-belligerence, and the pursuit of peace whenever possible. Islam ensures justice for all, weak and strong alike. The Sharia even supports the unjust, by deterring them from wrongdoing. In a well known hadith, the Prophet said, "Support your brother, just or wronged!" "O Prophet," his Companions said, "we support him if he is wronged, but how do we support him if he is a wrong doer?" The Prophet replied, "By preventing him from doing wrong."[11]

Ibn al-Qaiyim al-Jawziya (d. 751/1350) believed that the Sharia is the highest expression of justice and mercy. Oppression is a deviation from justice, cruelty is an abandonment of mercy, and harm is a failure to defend the interests of people. Oppression, cruelty, and harm have nothing to do with the Sharia.[12]

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10. al-Bukhârî, Muhammad b. Ismâ'il b. Ibrâhîm b. al-Mughîrah b. Bardizbah, al-Ju'fî, (d. 256/870), *Sahîh*, I (64/53) (Istanbul: Maktabat al-Islâmîyah, 1981), 97, henceforth, "al-Bukhârî".

11. al-Bukhârî, III (46/4), 98.

12. Ibn al-Qaiyim, Muhammad b. Abû Bakr, al-Jawzîya, *I'lam al-muwâq'in fî rabb al-'âlamîn*, III (Cairo, n.d.), 3.

The Holy Qur'an

The only source of the Sharia is revelation. This consists of two parts, the Holy Qur'an, the recital of which is an essential part of worship, and the Prophet's Sunna.

God has honored the Muslims with His final revelation to humanity. The Qur'an is the only existing record of divine revelation that is free of distortion and fabrication. Nothing has been added and nothing taken away. Falsehood cannot approach it from any quarter. It is today as it was revealed by God and brought into the heart of Muhammad, who gave it to his Companions, who in turn passed it on to those who came after them, and so on from generation to generation. It remains inscribed upon the hearts of the people and indelibly stamped upon their memories. It is written down and preserved in mosques, schools and homes. Universally recognized as the Glorious and Holy Word of God, the Qur'an is described by God as "a Book whose verses have been perfected and then detailed, from One who is Wise, Well-Aware..." (11:1). The Prophet was told that this is "a Book which We have sent down to you (Muhammad) to bring out man from darkness into light, with the permission of their Lord, to the path of the Mighty, the Praise Worthy" (14:1).

The Miracle of the Qur'an

The Qur'an is the greatest miracle of the Prophet Muhammad, peace be upon him. It is not like the miracles of the previous messengers and prophets. (Moses changed his staff into a snake, and Jesus healed the blind and lepers and raised the dead by the will of God.) These Prophets were sent to guide their people and to prepare the way for the final message sent with the Last of the Prophets. The message of Muhammad is that final message that shall endure until the end of time. God's revelation to Muhammad is a universal message and a mercy to the world. It embraces the life of man in this world and the next. It is the message for the individual and the community. It speaks to the mind and to the heart. It moves the body and the spirit. By the supreme wisdom of God an enduring and eternal miracle bears witness throughout time to the honesty and integrity of the last of His messengers. This revelation is not linked to the material world. It is a recitation of sublime beauty, a fountain of knowledge that will remain forever beyond the ken of any single human being. It continues to

astonish every new generation just as it astonished those who first witnessed it.

This supreme evidence—the Qur'an—is the miracle of eloquence, and eloquence was the highest achievement of the Arabs. They were unable to meet its challenge to come with "the like of it" (52:34) or to "bring ten chapters like it" (11:13) or even to "bring a chapter like it" (10:38). Thus the Arabs themselves confirmed the words of God who said, "If man and the jinn gathered to produce the like of this Qur'an, they could not produce its like even if they helped one another" (17:88).

The subject matter of the Qur'an and its contents could be described as the miracle of progress and development. On this level, at least, the miraculous nature of the Qur'an may be understood by all nations since a knowledge of Arabic is not required to appreciate this aspect of the revelation. Here we see how the Qur'an guides humanity to the pinnacle of success, be it in the purification of the human soul, in the building of the family, in the direction of society and the establishment of the state, or in the setting up of international relations on the most secure basis possible.

Finally, the Qur'an reveals its miraculous character in what could be called the miracle of knowledge. By this we mean the many aspects of the natural world discussed in the Qur'an. These things include the biological processes underlying the creation of man, animals, and plants, and the physical aspects of the creation of the heavens and the earth. In a clear and uncluttered language, the Qur'an makes many scientific assertions that precede discoveries of modern science by many centuries. Of course it would be impossible for any man living so long ago and in such a different world to predict accurately scientific discoveries that would not be made for well over a thousand years.[13]

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13. For a further discussion of the miracle of the Holy Qur'an Muhammad ᶜAbdullah Darāz, *al-Naba' al-'azîm: nazirât jadîdah fî 'l-Qur'ân*, (Kuwait: 1983), Sayed Qutub, *al-Taswîr al-fanî fî 'l-Qur'ân*, (Cario: 1983), and *Mashâhid al-qiyâma fî 'l-Qur'ân*, (Cairo: 1981), same author. For details on the Qur'an's challenge to humanity see Muhammad Rashid Rida, *al-Wahî al-muhammadî: thabût al-nubûwa bi 'l-Qur'ân*, (Cairo: 1933), and Muhammad Abu Zahrah, Shariᶜat al-Islâm dalîl ᶜala innahu min ᶜind Allâh, in *Al-Muslimoon*, (Cairo), no. 1, 1371 h, 30-35.

> But God testifies about what He has sent down to you. He has sent it down with His knowledge, and the angels also testify. And God is best as a witness (4:166).

The Immutability of the Qur'an

The Qur'an is the eternal word of God that will endure until He inherits the earth and all that is in it. It is not the book of a generation or an age, not that of a dynasty or an epoch. It is not a book whose time must naturally end and which will be replaced by another, as God's revelations to our ancestors were replaced by new scriptures. The Qur'an is the eternal message sent to the last of God's messengers. It is the final revelation of God to mankind, revealed in the hour of man's maturity when he would be ready to receive the eternal and universal message. There will be no revelation after this and no messenger will follow Muhammad, by whom God has sealed the line of the Prophets.This is why God has preserved the Qur'an from all distortion and corruption. He has declared this simply and plainly, saying, "It is Us Who have revealed the Reminder and We indeed are the Guardian of it" (15:9). Here God refers to Himself with the plural pronoun "Us." [14]

He lays special stress on this pronoun and also stresses the predicate, "Guardian." It is best simply to have the promise of God, Whose word is truth manifest. What then, when He places so much emphasis on His promise?

The Universality of the Qur'an

God has made the Qur'an a book for all people and all worlds. Its universality is clear in several places. Consider, for example, the verse, "The month of Ramadan in which the Qur'an was sent down as a guide for mankind" (2:185), and also, "This is nothing other than a reminder to all beings" (81:27).

The Qur'an is not a book for a favored race, a favored country, or a favored party. It is not meant only for intellectuals or spiritual leaders,

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14. This is a grammatical, not a natural, plural. Allah sometimes refers to Himself as "Us" in order to emphasize His Omnipotence and Power over creation. Other examples of grammatical plural is the use in French of "vous" (plural "you") as an honorific form of address when speaking to one per son, and the use of "We" in royal decrees when a reigning monarch refers to himself or herself. *OJ.*

not for rulers alone, and not only for the rich. It is for all people and contains all things. God told the Prophet, "And We have sent the Book down to you as an explanation of everything, as a guide, as a mercy and as good news for the submitters (to God as Muslims)" (16:89). The first Caliph, Abu Bakr, said, "Even if a camel's hobble were lost I would probably find it in God's Book."

The Qur'an is not only concerned with theology, belief, and ritual. It does not speak only about virtue and morality, and is not just a book of law. Look, for example, at the following two verses from the Second Chapter of the Qur'an.

> When you have divorced women, and they have reached their terms, then keep them in kindness or let them go in kindness. Do not keep them to their harm and violate (the limits). He who does that has wronged his soul. Do not make a joke of the signs of God (by your behavior), but remember God's favor to you and what He has sent down to you of the Book and of wisdom, with which He warns you. Fear God and know that He is aware of all things. And when you have divorced women and they reach their terms, do not prevent them from marrying their mates if it is agreed between them in kindness. This is to warn him among you who believes in God and the Last Day. That is more virtuous for you, and cleaner. God knows while you do not (2:231-2).

How can we categorize these two verses? They involve family law, moral and religious guidance, and a reminder of God and the Last Day. These verses also emphasize the fact that God knows everything that humans do not.

Part of the comprehensive nature of the Qur'an is that rather than addressing the mind alone, or the heart alone, it addresses the human being as a whole to simultaneously persuade the mind and arouse the heart.

The Qur'an does not address a narrow group of people in order to appeal to a specific intellectual or psychological type to the exclusion of all others, but addresses all people equally. The seeker of material facts will find in the Qur'an what satisfies his curiosity. The Qur'an also commands his attention and requires him to reflect upon and to refute doubt and falsehood.[15] The word for comprehend occurs fifty

15. "Islam speaks to the mind, and does not confine itself merely to feelings and emotions.

eight times in the Qur'an, the word for contemplate seventeen times, and the word for mind sixteen times, not to mention the many verses that include words for perception, consideration, reflection, argument, proof, and reasoning.

The seeker of spiritual truth will find food for the soul, as Moses did in the story of his quest for truth, and of his encounter with the man of whom God said, "Then found they one of Our slaves, to whom We had given mercy from Us and taught knowledge from Us" (18:65).

The Qur'an guides us to a knowledge of morality and the performance of good deeds. According to the Qur'an, one of three imperatives of faith is to "do good so that you may succeed" (22:77). But simply doing good is not enough. Muslims must also call others to do good too. "Let there be among you a group who call for good, and order what is right and forbid what is wrong" (3:104).[16]

Beauty and pleasure also have their place in the Qur'an, which directs our attention to an appreciation of nature, plants, animals, man, and of all creatures.[17] In addition to this, there is the sublime beauty of the Qur'an itself addressing the entire human character.

> Man, what has deceived you about your Lord, the Bountiful, Who created you, then fashioned, then proportioned you... (82:6-8).

Using the mind to see is the conscience's way to the truth, for thinking is the gateway of guidance through which faith is achieved, 'Say [to them, O Muhammad], "I urge you to one thing only, that you stand, for God, by twos and singly, and then reflect."' Comprehensiveness could not have gone any further in religion than addressing man's body and spirit, mind and conscience, all at once without exaggerating or underrating any one of them." ᶜAbbas Muhammad al-ᶜAqâd, *Haqâ'iq al-Islâm wa abâtîl khusûmihi*, (Cairo:1957), 24.

16. See also Muhammad ᶜAbdullah Daraz, *Dustûr al-akhlâq fil Qur'ân*, (Beirut: Mu'ssasah al-Risâla, 1985). Morality and good behaviour take up such a large portion of the Sharia that we can not adequately describe it here.

17. "And We have set constellations of stars in the sky and made it beautiful for viewers" (15:16). Also "And We have indeed beautified the sky of the world with lamps, made them missiles for the devils, and for them prepared the punishment of the Flame" (67:5); "And We have spread out the land, set fixed mountains in it and grown every kind of lovely pair in it" (50:7) and also "[Who has] sent down for you water from the sky, by which We have grown orchards of joy and beauty, whose trees it has not been for you to grow?" (27:60); "And He created livestock, in which you have warm clothing and other uses, some of which you eat, And in which you have beauty when you bring them home and when you take them out to pasture" (16:5-6); "He shaped you and made your shapes lovely..." (64:3); "The work of God who has perfected everything" (27:88).

The Prophet's Sunna

The Sunna is the way or method of the Prophet, upon whom be peace. It includes what he said, what he did, and what he observed others doing and silently approved.[18]

While the Qur'an is the first source of the Sharia, the Sunna is the second. The Sunna provides the theoretical explanation and practical application of the Qur'an. The Qur'an represents the "constitution" that contains the fundamental basis of the Sharia. It is indispensable for regulating Islamic life and for guiding humanity to the right path. The Sunna is the Prophet's way, or method of interpreting this "constitution." It teaches us the difference between what is relative and what is absolute by drawing on practical images from the life of Prophet Muhammad, upon whom be peace. The Qur'an confirms this, saying that the Prophet's mission is to clarify to mankind what has been given in the Qur'an.[19]

Had it not been for the Sunna, many things would have remained hidden from us. The Sunna is a major source of detailed information about the Sharia. The Qur'an commands Muslims to pray, but does not say how, when, how many times a day, or what types of prayers. These matters are fully explained in the Sunna. The Qur'an requires that the poor-tax be paid, but does not give details about how much should be given against what types of property, the minimum amount of property upon which such payments are due, or how much should be given and when. Again, the Sunna provides a detailed explanation. The same is true of fasting and pilgrimage.

Why is it necessary to follow the Sunna?

Some people say the Qur'an is enough for us and that we do not need to follow the Sunna. They say the Qur'an explains everything. They also claim that while God has protected the Qur'an from changes and distortions, the Sunna does not enjoy this same guarantee.

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18. The Prophet's utterances are known as 'hadith'. This is sometimes translated as "Prophetic tradition" or "tradition" and is one of the core terms of Islamic jurisprudence. *OJ.*

19. "And to you, We have sent down the Reminder for you to explain to mankind what has been sent down to them, and so that they may consider..." (16:44), and also, "And We have sent down the Book to you only for you to explain to them what they differed on, and as a guide and a mercy to people who believe" (16:64).

The Qur'an itself contradicts the first notion clearly stating that obedience to Almighty God is obedience to the Prophet, peace be upon him, "Obey God, and obey the Messenger..." (24:54). The Qur'an also says "Whatever the Messenger gives you, take it. And whatever he forbids, stop. And fear God. God is severe in puishment" (59:7). In fact, obedience to the Prophet is part of obedience to God, thus the Qur'an warns against disobeying the Prophet's orders and denies the faith of those who reject his authority.

> Whoever obeys the Messenger obeys God, and whoever turns away—We have not sent you as a keeper over them (4:80). [20]

The Prophet warned us about people who deny the Sunna. In one hadith he said, "I have been sent with the Qur'an and something else like it. There will be people who with bellies full (relaxing) on their beds will say, 'You should just observe the Qur'an. Whatever you find in it that is lawful is permitted, and whatever you find in it that is unlawful is forbidden.' Indeed! But donkey meat is forbidden to you and you may not eat animals with canine teeth."[21] The idea that the Sunna is extra contradicts the universal agreement of the Muslims across the ages, despite differences of doctrine and approach to jurisprudence. Muslims have always referred to the Sunna together with the Qur'an.

As for the argument that God has undertaken to protect the Qur'an but not the Sunna from distortion and corruption, Imam al-Shatibi (d. 790/1388) points out that God's protection of the Qur'an implies the protection of the Sunna, since protection of the thing that is explained (the Qur'an) must depend on the protection of the thing that explains it (the Sunna). The second is necessary for the first. In the darkest hour of every age, God raises up those who defend the Sunna from the distortions of fanatics, the forgeries of plagiarists, and the prophesies of fools.

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20. Also, "No, by your Lord, they will not believe until they make you judge of what is in dispute between them and find within themselves no dislike of what you decide, and submit fully" (4:65).

21. Ahmad b. Hanbal al-Shaibânî (d. 241/855), *al-Musnad*, IV (Beirut: 1983), 131; Abû Dâ'ûd, Sulaymân b. al-Gârûd b. al-Ashʿath al-Azdî al-Sijistânî (d. 275/889), *Sunan Abî Dâ'ûd*, IV (Beirut: Dâr al-Fikr, n.d.), 200 (no. 4604).

Are Isolated Sunna Narrations Legally Binding?

Some of those who try to undermine the Sunna say that only hadith reports that go back to the Prophet via numerous independent narrations, each confirming the other, can be accepted. They reject most hadiths, since these rely on solitary narrations. This is an old issue. Imam al-Shafi'i (d. 204/820) pointed out that in the Prophet's lifetime, a person used to come to him, learn something and then pass this knowledge on to his own people. This knowledge was binding on them, as it was on him. Furthermore, the Prophet used to send some of his companions to different tribes and regions. Abu Musa and Mu'adh were sent to Yemen for example, to spread Islam and teach the people their religion. These people were bound to observe what the Prophet's messengers taught them. They could not claim they needed further confirmation or a second opinion.[22] The Qur'an supports this also. God says for example,

> If a group of every troop of them did not go out, they might instruct themselves in religion, and they might warn their people when they returned to them, and so that perhaps they might take warning. (9:122).

Since any individual may distinguish himself from the rest of the community by study and depth of understanding, people should accept the authority of religious scholars, otherwise they would be of little benefit to their communities. A solitary narration, or *ahad* hadith, commands legal authority.[23]

The Difference between Qur'an and Sunna

The following are the most important differences between the Qur'an and the Sunna.

1. The Qur'an was revealed by Angel Gabriel while the Sunna was established by the Prophet Muhammad, upon whom be peace.

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22. See al-Shâfiʿî, Muhammad b. Idrîs, *al-Risâlah*, ed. Ahmad Shakir, (Cairo: n.d.) 401 f.

23. It is the integrity of the people who transmit hadith, not their number, that concerns us here. Narrators must be trustworthy and honest. They must also fulfill two conditions: impartiality and attention to the validity of the hadith sources they refer to. There should be no missing links in their chains of authority, from beginning to end. With regard to the hadith itself, both the *isnad* and the actual text of the report should be free from any oddities or defects. See Appendix Two.

2. The Qur'an is literally the word of God, and the Prophet's role was simply to convey it, while the Sunna contains the words and actions of the Prophet. It is the meaning and intent of the Sunna that is divinely inspired, not its formal expression.
3. The entire Qur'an has been conveyed to us via many different sources, while the Sunna is only partially related in this way. Numerous independent reports include instructions about the performance of prayers, pilgrimage and so on, but most of the Sunna consists of solitary narrations.
4. The Qur'an has a special status and function beyond simple documentation of the details of religion. For example, its recitation is an act of worship and it should neither be read for meaning alone nor be touched by those who are ritually impure.

The Recording of the Sunna

The recording of the Sunna passed through many phases. Many things the Prophet said were recorded during his lifetime. In the years directly following his death much care was taken to record everything that people remembered of what he said and did. The generation of Muslims who lived after the generation of the Companions placed even more importance on this. Finally, all this information about the Sunna was collated into books and critically assessed.

The most important early collections of the sayings of the Prophet (hadith) are *al-Muwatta* of Imam Malik (d. 179/795), the two collections, both called *Sahih*, by Imam Bukhari (d. 256/870) and Muslim (d. 261/875), four works, all called *Sunna*, by Imams al-Tirmidhi (d. 279/892), Ibn Maja (d. 273/886), Abu Da'ud (d. 275/889), and Nasa'i (d. 303/915), *al-Musnad* of Imam Ahmad b. Hanbal (d. 241/855), and the *Sunan* of Imam al-Darimi (d. 255/869).[24]

24. Mâlik b. Anas b. Abû ʿÂmr b. ʿAmr al-Asbahî, *al-Muwatta'* 2 vols, (Beirut: Dâr al-Kitâb al-ʿIlmîya, n.d.); Bukhârî, Muhammad b. Ismâʿil b. Ibrâhîm b. al-Mughîrah b. Bardizbah, al-Juʿfî, Abû ʿAbd Allâh, al-, *Sahîh al-Bukhârî*, 8 vols., (Istanbul: Matkabat al-Islâmîyah, 1981) English translation in Khan, Muhammad Muhsin, tr. *Translation of the Meanings of Sahih al-Bukhari*, 9 vols, (Chicago: 1976); Muslim b. al-Hajâj al-Qushairî al-Nisâbûrî, *Sahih Muslim*, 5 vols., (Beirut: Dâr Ihyâ' al-Turâth al-ʿArabî, n.d.), English translation in Abdul Hamid Siddiqi, tr. *Sahih Muslim*, 4 vols, (Lahore, 1976); Tirmîdhî, Muhammad b. ʿIsâ b. Surah, al-, *al-Jâmiʿ al-sahih*, 5 vols., (Beirut: Dâr al-Fikr, 1983); Mâja, Muhammad b. Yûsuf b. Mâja al-Qazwînî, [Ibn Mâja], *Sunan ibn Mâjah*, 4 vols., (Riyadh: Sharikah al-Tibbâʿh al-ʿArabîyah al-Suʿûdîyah, 1404/1984); Dâ'ûd, Sulaymân b. al-Gârûd b. al-Ashʿath al-Azdî al-Sijistânî, [Abû Dâ'ûd], *Sunan Abî Dâ'ûd*, 4 vols., (Beirut: Dâr al-Fikr, n.d.) English translation in

In addition to these, some scholars were particularly interested in the part of the Sunna that deals with the practical translation of the Prophet's teachings into daily life, and compiled manuals for popular instruction. Two of these are *Nayl al-'awtar* by al-Shawkânî (d. 1250/1832),[25] a commentary on a well known book by Imam Abdul Salam ibn Taimiya (d. 652/1245), grandfather of Ahmad b. Abdul Halim ibn Taimiya (d. 728/1328), and *Bullgh al-muram min adillat al-ahkam* by Ibn Hajr al-Asqalani (d. 852/1449).[26] A commentary on *Bulûgh al-murâm* by al-San'ani (d. 1099/1687), called *Subul al-salam*,[27] is perhaps better known than *Bullgh al-muram* itself. Both are indispensable for the student of the Sharia.

Other Sources

There are also a few secondary sources of the Sharia that are derived from the Qur'an and the Sunna. Scholars do not always agree on the validity or value of these. Two such sources are consensus, or *ijma'a*, and analogy or *qiyas*. These are accepted by most scholars as valid sources of law. Other secondary sources include consideration of the public welfare, juristic preference, consideration of custom, legal precedent, reports of the Companions, and so on. Scholars do not always agree about the validity of the results obtained by these methods. We will discuss these in more detail in Chapter Four.

Hassan, A., tr. *Sunan Abu Dawud, English Translation with Explanatory Notes*, 3 vols. (New Delhi: 1985); Nasâ'î, Ahmad b. ʿAlî b. Suʿaib, al-, *Sunan al-Nasâ'î*, 8 vols., (Beirut: Dâr al-Kitâb al-ʿArabî, n.d.); Ahmad b. Hanbal al-Shaibânî, [Ahmad], *al-Musnad*, 6 vols., (Beirut: 1983); Dârimî, ʿAbdullâh b. ʿAbdul Rahmân b. Faisal, al-, *Sunan al-Dârimî*, (Dâr Ihyâ' al-Sunna al-Nabawîya, n.d.).

25. al-Shawkânî, Muhammad b. ʿAlî b. Muhammad b. ʿAbdullâh, *Nayl al-awtâr*, 9 vols. (Beirut: Mustafâ al-Halabî, n.d.).

26. Ibn Hajr al-ʿAsqalânî, *Bulûgh al-murâm min adillat al-ahkâm* (Riyadh: 1402/1992).

27. Muhammad b. Ismaʿîl b. Salâh al-Sanʿânî, *Subul al-salâm*, 2 vols. (Beirut: 1980).

2

THE GENERAL CHARACTERISTICS OF THE SHARIA

The divine basis of the Sharia distinguishes it from all other legal systems. Because of its divine origin, the Sharia enjoys an unparalleled authority and inspires admiration and awe in the hearts of those who submit themselves to it. Obedience to the Sharia comes from a firm faith in the completeness, perfection, and eternal authority of the divine writ. God, who revealed the Sharia, is not affected by human whims and emotions, and not subject to the shortcomings and weaknesses of men. Rather, God is the Creator of us all and the One who knows exactly what is best for us: "Would He Who created not know? And He is the All-Kind, the Well-Aware" (67:14).

Because of this, the Muslim—whether governor or governed—must abide by the Sharia. As for those who govern, God has commanded them to rule according to what He has revealed in the Qur'an, and describes whoever fails to do this as disbelievers, wrongdoers, and truly wicked.[1] With regard to the governed He says,

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1. The author refers here to three often quoted verses from The Holy Qur'an 5:44, 45, 47, "We sent down the Torah, in which there is guidance and a light, by which the prophets who submitted (to God) judged the Jews, and the rabbis and the priests by what they were entrusted from the Book, and they were witnesses to it. So do not fear people, but fear Me. And do not sell My verses at a low price. *Whoever does not judge by what God has sent down, those are disbelievers.* In which We wrote for them, 'A life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth and for wounds requital.' But whoever forgives in charity, it will be penance for him. *Whoever do not judge by what God has sent down, they are wrongdoers...* Let the People of the Gospel judge by what God has sent down in it. *Whoever do not judge by what God has sent down, those are truly wicked." OJ.*

> The words of believers when they are called to God and His Messenger for him to judge between them are "We hear, and we obey." And those are the successful (24:51).[2]

Because of its divine origin, the Sharia holds a unique place in the hearts of the Muslims. Respect and deference toward it is an act of faith, as is enforcing it and obeying it. For Muslims, to apply and obey the Sharia is an act of devotion. This obedience is a fundamental aspect of faith.

> No, by your Lord, they will not believe until they make you judge of what has been in dispute between them, find within themselves no dislike of what you decide and submit fully (4:65).

Muslims believe that the Sharia contains the most just, most complete, and most comprehensive system of government possible. This belief explains the great confidence Muslims have in it and their unshakable loyalty to it. Muslims also believe that God is aware of all our deeds, and that we will be held accountable for them.[3]

Muslims usually observe the teachings of the Sharia in good faith. It is the inner call of the conscience rather than fear of the law that causes them to do this. When people, giving in to desire and selfishness, violate some part of the Sharia, guilt pursues them until they repent. There are accounts of people who came to the Prophet and demanded that he punish them for some crime they had committed. They did this without being pursued by any civil authority, acting in earnestness and out of faith in God. They wanted the Prophet to punish them according to God's law so that when they died they would meet their Creator in a state of moral purity.

Throughout their long history, Muslims have lived according to the Law of the Qur'an and Sunna, not only observing the general principles of their faith but also the letter of the law. They used to say the

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2. Also, "And it is not for believing men or women, when God and His Messenger have decided an affair, to have any choice in their affair. And whoever disobeys God and His Messenger, he indeed has clearly strayed" (33:36) and "When it was said to them, 'Come to what God has sent down and to the Messenger,' you saw the hypocrites turn away from you" (4:61).

3. "Whoever has done an atom's weight of good will see it, and whoever has done an atom's weight of ill will see it" (99:7-8).

finger that is cut by the Sharia does not hurt, because it has been cut according to the command of God.

We can give many examples of the Sharia's impact on its adherents. Anas said that Abu Talha was reciting the ninth chapter of the Qur'an, known as "Repentance," and came to the words "Go out, lightly or heavily, and struggle with your wealth and your lives on the way of God! That is best for you if you only knew"(9:41). Abu Talha turned to his sons and said, "Prepare me for battle." They tried to discourage their aged father saying, "You fought with the Prophet until he died. Now we will fight in your place." Abu Talha replied, "Young or old, God hears no excuse," and prepared himself for battle. He fought and died at sea, so far from land that his shipmates sailed for seven days before finding an island on which to bury him.[4]

According to al-Zuhri, Sa'id Ibn al-Musayab insisted on fighting even after he had lost one of his eyes. When someone told him to withdraw he said, "God commanded the light and the heavy to go to war ... . If I do not fight, I may find comfort, but not peace of mind."[5]

On Obedience

To illustrate the history of submission to the Sharia, two examples come to mind. The first of these involves the Arabs' attitude toward the prohibition of intoxicants. In the pre-Islamic period, the Arabs were so fond of wine that they gave it more than a hundred names. Because of their fondness for it, God moved slowly to prohibit strong drink: it was not banned overnight. When the Qur'an announced the absolute prohibition of alcohol, it was declared to be Satan's handiwork.[6] The Prophet then prohibited the Muslims from selling wine and from giving it to non-Muslims as gifts. Immediately after this was announced, the Muslims brought out whatever alcohol they had and poured it into the streets to demonstrate their submission to the Law. What is even more astonishing, some of those who were drinking at

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4. al-Qurtubi, Muhammad b. Ahmad b. Abû Bakr al-Ansârî (d. 671/1273) *al-Jamiʿ li-ahkâm al-Qur'an*, V (Cairo: Dâr al-Kutûb al-Misrîyah, 1952), 150.

5. ibid. VIII, 150-151.

6. "O you who believe, alcohol, games of chance, idols and divining arrows are filth from Satan's handiwork. Avoid them so that you may succeed" (5:90).

the time they heard the verse "Will you then stop" (5:91) threw down their glasses declaring "We have stopped, we have stopped, our Lord!"

The second example involves the matter of veiling. Before Islam, women used to mix with men freely and could even sometimes be seen bare-breasted. God commanded Muslim women to set themselves apart from non-Muslim women by refusing to follow pagan habits and customs of dress, and told them to cover their heads, ears, necks and upper bodies completely. Aisha, Mother of the Faithful, related how the women who had migrated with the Prophet from Makkah reacted when they were told to cover themselves up. She said: "May God bless the first women who immigrated from Makkah. When they heard God's command to 'draw their veils over their bosoms,' they tore their clothes up to make veils" (24:31).[7] As for the women of Madinah,[8] one day Aisha was sitting with a group of women who began praising the women of the Quraish. She said,

> Of course the women of the Quraish are due much praise, but by God's name I have not seen better than the women of Madinah. None are deeper in their faith in the Book of God or more true to the revelation than they are. When the verse describing veiling was first revealed, they listened to their men folk reciting, 'draw their veils over their bosoms.' Straight away, each one of them tore her dress and tied her head closely in submission to the God's command. All of them stood behind the Prophet covered up as though there were crows on their heads. [9]

These women did not wait one or two days in order to buy suitable cloth to make head coverings large enough to draw over their upper bodies. Any available cloth, of any color, was suitable. If they didn't have any cloth, they tore their clothes. They did not mind how they would look, even if it seemed that they had "crows on their heads."

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7. See al-Qurtubî, *al-Jamiᶜ li-ahkâm al-Qur'an*, XII, 230.

8. A'isha said, "the women of the *Ansâr*."

9. See, Ibn Kathîr, Ismaᶜîl b. ᶜUmar (d. 774/1373), *Tafsîr ibn Kathîr*, III (Beirut: Dar al-Islâm, 1992), 284.

On Financial Obligations

Zakat is a kind of tax levied on Muslims once a year. While it is normal for people to be reluctant to pay taxes, this has not always been the case when Muslims come to pay zakat. Ubay ibn Ka'ab said:

> When the Prophet sent me to collect zakat, I assessed the people's property, one by one, until I came to the very last man. When he had gathered all his wealth before me I couldn't find anything to take other than a young she-camel.[10] So I told him this would be his contribution.
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> "This camel can neither give milk, nor carry anything on her back," said the man. "I swear by God that neither the Prophet nor any one sent by him has ever taken anything from my property before. I could never consider presenting to God, blessed and exalted is He, any camel that could neither give milk nor carry a load!" He then pointed to another animal and said, "This camel[11] is strong and fat. Take her instead.
>
> "I cannot take anything that the Prophet did not tell me to take, but he is not far from here. If you like we'll go see him and you can offer him what you offered me. If he accepts it then pay, and if he doesn't then don't."
>
> "I will," the man answered.
>
> We went together taking with us the camel he'd offered me. When we came to the Prophet the man said, "O Messenger of God, [this man] came to take a portion of my property. By God's name, neither you nor anyone sent by you has ever come to take anything from me before. Once I had collected my property he decided that I should give a young she-camel. But this animal can neither give milk nor carry anything on its back. I offered him this strong young camel but he refused to take it." Then he said, "This is why I have come to see you. Take this camel, O Messenger of God."
>
> "He asked you for what you must pay. But if you want to pay more by way of generosity, we will accept it and God will bless you for it," the Prophet told him.
>
> "Here she is, O Messenger of God. Take her."
>
> So the Prophet told someone to take his camel, then he prayed for the man that God should increase him in wealth and bless him.[12]

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10. Arabic: *ibnat makhâd*, a new-born camel.*OJ*.
11. Arabic: *naqâh*, a female camel able to bear young.*OJ*.
12. Ahmad, V, 142.

The man whom Ubay met believed that his responsibility to pay zakat was to God, not to any public official. Many other people also came to offer zakat. When Omar ibn al-Khattab was Caliph, a group of men came from Syria in order to pay zakat for their horses. They said, "We have been given property, horses and slaves, which we hope to cleanse and to purify."[13]

On Administrative Regulations

The Sharia covers more than the rulings we find in the Qur'an and Sunna. It also includes such things as traffic regulations, municipal affairs, housing regulations, and many other kinds of laws that aim to safeguard the public interest. According to the Sharia, these regulations become binding as soon as the government issues a legislative decree. For example, in recent times Hanafi jurists have argued that when there is epidemic or famine the ruler may call for people to fast. They are then required to fast, so long as they are not exempted in the normal way. While obedience to the ruler is binding so long as he is not in rebellion against God, the ruler also bears a responsibility to apply the Sharia and any laws that relate directly to it. In the Qur'an, God says, "You who believe, obey God, and obey the Mesenger and those of you who are in authority" (4:59). The Prophet said, "Whoever obeys the ruler obeys me, and whoever disobeys the ruler disobeys me."[14] He also said that Muslims must do as their ruler tells them whether this pleases them or not, but if their ruler orders them to do wrong they should not obey him.[15]

Spiritual and Temporal Aspects of Sharia Law

The Sharia recognizes the spiritual and material sides of life. That is why enforcement of it depends first on self-restraint inspired by faith and morality, then, on the authority and coercive power of the state. Sharia law places the interests of this world beside those of the next.

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13. al-Hâkim, Muhammad b. ᶜAbd Allâh b. Muhammad (d. 404/914), *al-Mustadrak*, I (Beirut: Dâr al-Kitâb al-ᶜArabî, n.d.), 400-1.

14. al-Bukhârî, IV (56/109), 8.

15. ibid. (93/4), 105.

A clear distinction between right and wrong, between what is permitted and what is forbidden, guides and reassures Muslims in everything they do.

The Sharia recognizes that human justice will always fall short of the legal ideal it describes. Courts must rule according to the evidence they have. If a witness has lied or documents have been falsified, the verdict of the court is legally enforceable but religiously invalid. To willfully act upon such a ruling is prohibited by religion. This is confirmed in the Qur'an and the Sunna. The Qur'an says,

> And do not eat up your wealth among yourselves dishonestly or try to bribe officials with it in order knowingly to eat up part of the people's property in sin (2:188).

The Prophet said, "You request my ruling to settle your disputes. Some of you may be more eloquent in presenting their argument and so I may judge in favor of whoever is more eloquent. To whomever I give a portion of his brother's property by mistake, I cut a piece of hell-fire, so he should not take it."[16]

The Sharia, then, has a judicial aspect and a religious one. A judge rules according to the evidence that is before him but the verdict of God is according to truth. Therefore, the ruling of a judge may fall short of an ideal ruling according to religion. For example, if a person releases someone from a debt but does not inform him of it, he may still legally claim his debt from the man. In such a case, a judge would probably rule against the debtor, since neither the judge nor the debtor would know that the debt had been canceled. While this ruling is formally valid according to the law, it is invalid in religion since God and the creditor would both know that there was no longer any debt to claim. Therefore, Sharia law makes a distinction between a legal verdict and a religious ruling. Legal rulings come out of the courts and result from the activities of judges, while religious rulings belong to the realm of theoretical law and are normally issued in response to a question presented to a mufti, the senior religious scholar in any given country. A judge will rule according to his understanding of the principles of Sharia law, legal precedent, and the evidence presented

16. al-Bukhârî, III (52/27), 163.

to him. He will not normally consider the purely religious dimensions of a problem. The mufti, on the other hand, must consider all aspects of a problem. If there is a conflict between the religious and legal aspects of a question, the mufti will rule according to the religious view of it.

When discussing hypothetical cases, scholars frequently say that while the legal ruling is such and such, it differs from the correct religious position. For example, a creditor may demand payment of a debt but fail to prove to a judge that he is actually owed any money. Then the debtor could take the opportunity to refuse payment. From the point of view of religious law, the creditor may still recover his right without the debtor's consent, or even without his knowledge. But no judge would be able to support a creditor's use of force if the latter could not prove that he really had a debt to recover.[17]

MORALITY

A second characteristic of the Sharia is its attention to morality. This attention is also the result of the Sharia's divine origin. The Sharia is a moral law in the full sense of the word. Thus the Prophet Mohammed said, "Verily, I have been sent for the perfection of morality."[18]

The Sharia aims to define the duties and obligations of human beings, first before God and then before the community. The legal content of the Revelation guides the individual to the fulfillment of his obligations, which are in fact the rights that others hold over him. People bear obligations towards one another. To observe these obligations is to render each other our rights. Thus the human being may be seen as a bearer of responsibility. Humanity was not created without purpose, nor left to solve its problems alone: human beings must then have responsibilities as well as rights.

The objective of the Sharia is to insure the stability of society and the regulation of social affairs. Human legislation may sometimes deviate

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17. Mustafâ Ahmad al-Zarqâ', *al-Fiqh al-islâmî fî thaubihi al-jadîd: al-madkhal al-faqhî al-ʿâm*, I (Damascus:1967-8), 58-9.

18. al-Hâkim, *al-Mustadrak*, II, 613, al-Hakim says it is authentic *(sahîh)* according to the criteria established by Imam al-Bukhari.

from the principles of morality and religion in order to achieve these goals.

The Sharia has made human welfare—in terms of social stability and personal relations—the central focus of public and private life. In so doing, it has broadened people's horizons and protected the sanctity of spiritual and moral values.

As we have explained above, the Sharia clearly addresses both spiritual and temporal aspects of life. The temporal side of the Sharia governs what is external to the life of the community, for example its public organization and the management of the day to day affairs of the world. On the other hand, the spiritual concerns of the Sharia apply to the inner life of the individual. Here the Sharia guides each Muslim from within his own heart. Because of this, the Sharia is able to impose special kinds of penalties for certain transgressions and leave their enforcement to the conscience and piety of each Muslim. These penalties—sometimes referred to as *kaffara*, or penance—are beyond the jurisdiction of courts and judicial authorities. For example, the penance for breaking an oath is to feed ten poor people, to provide them clothing, or to buy the freedom of a slave, or to fast for three days.[19]

The penance for accidental homicide is to buy the freedom of a Muslim slave, "And whoever does not have the means must fast two consecutive months as a penance from God" (4:92). The penance for breaking the fast of Ramadan is the freedom of a slave, a fast of two consecutive months, or the feeding of sixty needy people. Thus penance is a penalty that involves worship, or you could say that it is worship that contains a penalty. Either way, its central element is a moral responsibility that cannot be enforced by the state. Islam does not permit a double standard of law and morality, just as it does not acknowledge any distinction between religion and politics.

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19. "The penance for it [breaking an oath] is the feeding of ten of the needy with the average of what you feed your own family or the clothing of them, or freeing a slave, and for him who does not find [the means to do so] then a fast of three days. This is the penance for your oaths when you have sworn" (5:89). According to the majority of scholars this order of precedence must be maintained, however, Imam Malik thought that it was up to the individual to choose which type of penance he would offer.

Human Law and the Sharia

Custom is an important source of legislation. With regard to human law, the behavior that people have come to recognize among themselves as normal may be codified into a written legal code even though a given custom may be harmful or unjust. Human law is ultimately made in the image of society, for better or for worse. The Sharia liberates society from the pressures of selfishness and greed, and frees people from the chains of degenerate traditions and anti-social habits. Its purpose is to heal and strengthen rather than to justify weakness and perversity by giving these an air of legality. The Sharia sanctions only the good and the fruitful of what society embraces.

The standards of morality reflected in the Sharia are established by the Qur'an and the Sunna, not by custom. For example, as we mentioned earlier, at the time of the revelation, the Arabs were fond of wine and gambling and had more than a hundred words for wine. The Sharia contradicted the customs and attitudes of the Arabs who saw nothing wrong in strong drink and gambling. It also ignored the commercial and economic benefits that some people derived from the sale of alcohol. The Qur'an simply states, "They question you about intoxicants and gambling. Say, 'In both is great sin and (some) virtue for people, but the sin of both is greater than their benefit'" (2:219). According to the Qur'an, moral values are more important than commercial interests.

Before Islam, concubinage was common among Arabs and slave women were often used as prostitutes. Several kinds of extra-marital relations, collectively known as *istibda'*, were common. The Arabs saw nothing wrong in any of these since they formed part of their customs and traditions. Nevertheless, God prohibited all sexual acts outside marriage saying, "And do not consider fornication or adultery. Either is an immoral act and an evil way" (17:32), and "that you not take up vices, whether openly or secretly..." (6:151).

In addition to regulating sexual relations through marriage, the Sharia requires men and women to behave modestly and with self-restraint. This is to protect the community from illicit sexual behavior, which always poses a threat to the fabric of society.

> Tell believing men to lower their eyes and guard their privates. That is purer for them. God is Well-Aware of what they do. And tell the

believing women to lower their eyes and guard their privates... (24:30-1).

Temporary interests are not the only concern of legislation, nor are they the only focus of commands and interdictions. The purity of the soul matters equally. Therefore, it is not surprising that the Qur'an speaks of giving alms in these terms: "Take alms from their wealth to purify the..." (9:103). This is a moral objective that never occurred to tax collectors or financial planners.

Islamic legislation does not stop at codifying morals but it goes on to protect them and to punish those who defy them. The Sharia prescribes penalties for adultery and drunkenness, among other things. In some cases, such as gambling, local rulers are free to impose their own punishments. This differs from Western law which does not generally place such a clear emphasis on issues of public morality. For instance, the philosopher Kant drew a sharp line between legality and morality of action and defined justice as "the apparent execution of law."

As religion becomes less and less important, issues of law and morality become divorced. The result of this is usually a disregard for, and degeneration of, moral standards. Thus, issues of morality pose a constant source of difficulty in modern times. Examples of this are the problem of sexual license and the trade in intoxicants and pornography.

Noel Coulson discusses this problem in his book, *Conflicts and Tensions in Islamic Jurisprudence* and compares Islamic law with English law:

> Islamic law embodies the principle of strict enforcement of sexual morality in the severe punishment it prescribes for the offence of *zina*, or fornication. Under English law a sexual relationship outside marriage is not a legal offence unless it is aggravated by circumstances such as lack of consent, the young age of the girl, the blood relationship of the persons concerned, or unnatural behavior, which will amount to the criminal offenses of rape, unlawful carnal knowledge, incest, bestiality, or sodomy. Islamic law, on the other hand, holds that any sexual relationship is a crime unless it is between husband and wife or was, in the old days, between a master and his slave concubine. At the same time, the liability of the parties to an act of *zina* for punishment cannot, in practice, be dissociated from the

rules relating to proof of the offence. This must be established by the eyewitness of four adult Muslims of established integrity of character. No doubt an act of sexual immorality committed in circumstances where such testimony is forthcoming would amount at least to the criminal offence of public indecency, even under English law.[20]

Differences of Approach and Understanding among Jurists

These observations on the Sharia and morality should be understood within the general context of Islamic jurisprudence, of which there are four main currents or schools. The Hanafi school, for instance, maintains that formal correctness and apparent conformity to the law is in itself sufficient evidence of validity, at least in the matter of contracts. This takes no account of intent, ulterior motives, or other extenuating circumstances. On this basis, the Hanafi jurists have sanctioned certain acts that other jurists have forbidden, and distinguished between what is legally permissible and what is religiously prohibited. A Hanafi judge may paradoxically support the legality of a religiously prohibited act so long as certain legal conditions are satisfied.

Of course, Hanafi fiqh does sometimes consider motive and intent. For instance, a man who is about to die may not divorce his wife simply in order to deprive her of her inheritance. According to Hanafi scholars this divorce is legally invalid.

Fiqh is ultimately a matter of fallible human opinion and does not necessarily reflect the spirit of the Sharia, which places great emphasis on motivation and intent. The Prophet rejected any action that was not based on intention and said, "Actions are founded on intentions, and every person will be rewarded according to what they have intended."[21]

The Hanbali jurists seem to come closest to the true spirit of the Sharia, giving primary consideration to intention beyond sterile formality and conformance to legal criteria. Many of these scholars have passionately denounced the sanctioning of loopholes and technicalities, whose purpose is merely to get around the Sharia and

20. Coulson, N. J., *Conflicts and Tensions in Islamic Jurisprudence*, (Chicago: 1969), 77.
21. al-Bukhârî, I (1/1), 2; Muslim, V (45/155), 1515.

undermine its authority. They support their arguments with evidence from the Qur'an, the Sunna, and the judgements of the Companions and the first generations of the Muslims. One of the most prominent advocates of this approach was Ibn Taimiya (d.711/1311). His student, Ibn al-Qaiyim (d. 751/1350), takes up the same theme in two of his books, *I'lam al-muwaqi'in* and *Ighathat al-lahfan min mukayid al-shaytan*.

As an example of their approach let us see what they had to say about divorce. Ibn Taimiya and Ibn al-Qaiyim felt that this subject had been mishandled for many centuries and that while people had been observing the letter of the law they had forgotten its spirit. They refused to accept the validity of a divorce pronounced by someone who was drunk or angry. Furthermore, they challenged the validity of divorces resulting from an oath, ("If you don't do such and such I will divorce my wife"), or from the fulfillment of some predetermined condition ("If your father does such and such you are divorced"). Finally, they rejected the simultaneously pronounced multiple divorce. Ibn al-Qaiyim and Ibn Taimiya did not distinguish between the moral values of divorce and the legal view of it. Such moral values have now been incorporated into the family laws of the Islamic countries.

The value the Sharia places on high moral standards is indicative of the moral character of Islamic Law. The Sharia promotes high moral standards for their own sake, not merely because they contribute to social stability and public order. For example, the prosecution of war is subject to certain moral constraints. Sharia law prohibits combatants from demolishing buildings, destroying crops, mutilating corpses, or killing non-combatants. These guidelines, among others, were established by the Prophet Muhammed and his immediate successors.

Imam Muslim reports that whenever the Prophet appointed someone to command a military unit, he would advise him to be pious and to be good to his fellow Muslims, and also tell him to "Fight, but do not plunder, do not break your pledge, and do not mutilate the dead or kill children."[22] Anas also related that when the Prophet deployed an army he would say, "Forward, in the name of God. Do not kill the

22. Muslim, III (32/2), 1356 (no. 3-1731).

elderly, children or women. Be righteous and strive toward truth. God loves those who persist in righteousness."[23]

Abu Bakr advised one of his commanders saying, "You will find among them monks, leave them to pursue their own purpose. You shall observe ten points: kill no women, kill no children and kill no old people, do not uproot trees, destroy habitations, neither kill sheep nor camels except for food, do not destroy crops, and be neither treacherous nor cowardly."[24] Omar gave the same advice to his commanders. These were the rules of war the Muslims observed in their early military campaigns.

An Example of the Moral Basis of the Sharia: The Welfare and Treatment of Animals

Ethics are also the driving force behind the Muslim attitude toward animals. Sharia law provides for the protection of animals, the maintenance of their welfare, and the prevention of cruelty to them. This is an entirely moral issue since cruelty to animals could not threaten the social or political stability of society. Animals cannot revolt, go out on strike, prosecute their owners for unfairness or abuse, or challenge their owners' interests in any way. The issue of the welfare of animals is ultimately related to concepts of justice, mercy, piety, and fear of God.

There are several hadiths about the treatment of animals. In one, a woman was told she would be punished in her grave because she had confined a cat to death. She had neither fed it, nor watered it, nor had she set it free to fend for itself.[25] In another case, the Prophet came across an emaciated camel and said, "Fear God in these dumb animals. Ride them in good health and [slaughter] them in good health." Imam Bukhari reports the story of a man whom God praised and forgave because he gave water to a thirsty dog. The Prophet mentioned this and said, "There is a reward for kindness to every living thing."[26]

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23. Abû Dâ'ûd, III, 37 (no. 2614).
24. Mâlik, II, 6.
25. al-Bukhârî, IV (60/54), 152.
26. Abû Dâ'ûd, III, 23 (no. 2548); al-Bukhârî, III (46/23), 103).

The Prophet also said, "God has prescribed proficiency in all things. Thus, if you kill, kill well, and if you slaughter, slaughter well. May each one of you sharpen his knife and spare the beast its suffering."[27] In another report the Prophet came upon a man who had tied up a sheep and was sharpening his knife in front of it. He asked "Do you want to kill it twice? Can't you sharpen your knife before you tie it up."[28]

Ibn Omar once passed by some boys who were shooting arrows at chickens. If they missed they would say that the arrow would be for the bird's owner. The boys ran away when Ibn Omar came. He called out, "Who did this? May God curse whoever does such a thing! The Prophet used to curse people who took live animals for target practice."[29] The Prophet also forbade the baiting of animals to fight and prohibited beating them or branding them on their faces.[30]

Muslim rulers used to disapprove of people for mistreating animals. Malik relates that Omar ibn al-Khattab once passed by a donkey standing with two bricks on its back. As the Caliph was removing the bricks, the donkey's owner came and said, "What are you doing with my donkey, Omar? Are you its Sultan as well?" Omar told her, "What do you think keeps me here?" Ibn Rushd (d. 595/1198) explains that the meaning of this is obvious and mentions that the Prophet said, "Each of you is a shepherd responsible for his flocks, and the Imam is a shepherd responsible for his flock."[31] Omar said, "If a camel dies at the bank of the Euphrates as a result of carelessness, I would fear that God might ask me about it."[32]

Al-Musayab ibn Diram said, "I saw Omar Ibn al-Khattab beating a porter and telling him that he should not lay a load on his camel that it could not bear." Following the example of Omar Ibn al-Khattab,

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27. Muslim, III (34/57), 1548 (no. 57-1955).

28. Al-Hâkim, *al-Mustadrak*, IV, 231; al-Hakim says it is authentic *(sahîh)* according to the criteria established by Imam al-Bukhari. The hadith goes back to Ibn Abbas.

29. Muslim, III (34/59), 1550 (no. 59-1958).

30. Abû Dâ'ûd, III, 26 (no. 2562, 2564).

31. al-Bukhârî, I (11/11), 215.

32. al-Katâni, Muhammad ᶜAbd al-Hayy, *al-Tarâtib al-idâriya: nizam al-hukm al-nabawiya al-idâriya: nizam al-hukm al-nabawiya*, I (Beirut: Dâr al-Kutub al-ᶜArabî, n.d.), 268.

another caliph, Omar ibn Abdul Aziz, once wrote to Hayan, (his govenor) in Egypt, saying "It has come to my knowledge that there are transport camels in Egypt that are loaded with more than a thousand pounds. I do not want to see any camel carrying more than six hundred pounds."[33]

Later, Muslim scholars established minimum standards of care for various kinds of domestic animals. This information is normally found in the chapter on *nafaqat*, or expenditures, in books of jurisprudence. This was the first time such things were set into law. The motivation for it was not merely to preserve or safeguard material assets or communal interests. An important aspect of this legislation was its moral and ethical basis. Its primary impetus was to prevent injustice and suffering.

Animals feel pain and know fear but have no means of defending themselves or protecting their interests. The scholars determined when it was justifiable to beat animals used for carrying and pulling, where on their bodies they could be beaten, how hard they could be beaten, and the tools with which to beat them. For example, they said it was unlawful to beat an animal that slips or stumbles. It is also unlawful to hit a beast on the face, or with an iron bar, or to stick it with sharp spurs.[34]

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33. ibid. II, 152.

34. According to al-Katani, "An animal's owner has to feed and water it even if it is no longer of use to him. This is clear from what Ibn Omar said about the woman who was punished because of a cat she confined without feeding or watering it until it died. If the owner is unable to supply its needs, he should either sell it or hire it out or, if it is good for meat he may slaughter it. It is prohibited to curse animals. Once, when the Prophet was travelling he heard a woman cursing her camel. He said, 'Remove its load and let it go, now that it is cursed' [Muslim, IV (45/24), 2004 (no. 80-2590)]. He also said 'No cursed camel shall be in our company' [Muslim, III (45/24), 2005 (no. 82-2596)]. The Prophet also said, "Cursers are neither intercessors nor witnesses on the Day of Resurrection" [Muslim, III (45/24), 2006 (no. 86)]. It is also prohibited to load a pack animal with more than it can carry, or to milk it in a way detrimental to its young, because its milk is for its own offspring. Someone who milks animals should clip their nails so as not to hurt the animal's udder. An animal's forelock or tail should not be cut, and no bell should be hung on it for identification. It is reprehensible to overfeed animals or force feed them to make them fat. Those who torture chickens in cages, confine sheep without food or water, or tether mules and leave them without food or water to the brink of death, will be punished by God in this world or in the next, unless forgiven..." al-Katâni, *al-Tarâtib al-idâriyah*, II, 151-2.

It is the task of every Muslim to object to any unfair act and report it to the ruler. In his manual of public policy, *Ahkam al-sultaniyyah*,[35] al-Mawardi (d. 450/1058) said that the inspector of weights has the right to object to whoever loads his pack animal with more than it can bear. Sheikh Abu Ali ibn Rahhal said that being kind to animals is a matter of following the Sunna of the Prophet. Since there is a reward in being kind to them, there must also be sin in being cruel to them. However, Ibn Rahhal goes on to say that if an animal's owner overloads it, he can not be told to stop, the matter must be left to his conscience and the fear of God. This position is contradicted by the hadith that promises a reward for kindness to all living things which Abu Omar cited as evidence that the "abuse of animals is sinful. What is sinful is abominable, and the abominable should be eradicated. Had the Imam's warning to fear God been a sufficient deterrent [for people to desist from lawlessness], then there would have been no need for punishment in the Sharia."[36]

Concern for the welfare of animals has always been a feature of Islamic law. Recently, morally and ethically minded people have again spoken out for the protection of animals, echoing the moral and ethical concern that lies at the source of Sharia law.

PRACTICALITY

The Sharia is not above recognizing reality for what it is and moving to reform and improve it. At the same time, it never loses sight of the high moral standards that it seeks to establish. This is not a utopian dream of a perfect world. It does not entice us with the impossible ideals of Plato's *Republic*[37] or of al-Farabi's *al-Madinat al-fadilah*.[38] Nor does it share the communist's faith in the dawn of a new age when property will vanish, classes will be non-existent, and there will no longer be any need for authority or justice, police or prisons. Rather, the Sharia regards human beings as they are, as God has created them,

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35. Alî b. Muhammad b. Habîb al-Mâwardî, *Ahkâm al-sultânîya*, (Beirut: 1982).

36. al-Katâni, *al-Tarâtib al-idâriyah*, II, 103-4.

37. Plato, *The Republic*, tr. Benjamin Jowlett, (Airmont: 1968).

38. Muhammad b. Muhammad b. Tarkhan al-Fârâbî (d. 339/950), *Kitâb 'aarâ' ahl al-madînah al-fâdilah*, ed. Ahmad Nasrî Nâdir (Beirut: 1959).

with a terrestrial body and a heavenly spirit, with animal instincts and high aspirations, with selfish motives and altruistic tendencies, with an urge to self indulgence and an impulse toward piety.

The Qur'an calls for the same punishment to be inflicted upon the aggressor as the agressor had inflicted on others. This established a degree of justice and also left the door open for people to improve themselves and raise themselves up in piety and grace. The Qur'an says,

> The reward of a bad deed is a bad deed equivalent to it, but whoever excuses and makes peace, his reward is up to God. He does not love wrongdoers (42:40).[39]

Neither the Qur'an nor the Prophet requires Muslims to renounce the world. The Prophet said, "Blessed is the rightful wealth of a righteous person"[40] and, "No wealth has been more useful to me than that of Abu Bakr."[41] The Prophet prayed for God to bless his personal servant, Anas, with increasing wealth and many children.[42]

Man's love for wealth is an aspect of reality and an integral part of human nature. There is no danger in taking this into account and recognizing it, while striving to elevate and refine this natural desire and direct it to the benefit of society. To repress such a thing is both useless and futile. While the Sharia sanctions the right of ownership, it imposes certain precautionary restrictions, as will be explained later.

The Sharia does not depend solely on religious and moral restraint to protect people's rights but also contains a system of punishment. It is not possible to discipline all people just by teaching them the difference between right and wrong. For some a painful lesson is necessary to encourage them to return to the right path. Punishment also discourages others from violating the law. The third Caliph,

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39. Also, "If you punish, then punish with the like of what you were punished with. But if you are patient, then it is better for the patient" (16:126).

40. Ahmad, IV, 197.

41. Ahmad, IV, 366.

42. Anas said, "My mother said, 'O Allah's Apostle! Please invoke Allah on behalf of your servant [Anas].' He said, 'O Allah! Increase his wealth and children, and bestow your Blessing on whatever You give him'" al-Bukhârî, VII (80/19), 152.

Othman, used to say, "God restrains by force whoever is not restrained by the Qur'an."

The Sharia recognizes two types of punishment. The Qur'an determines the first type. These are the mandatory Islamic punishments, or *hudûd*, which includes *qisâs*, the right of retaliation. Since these come directly from the Qur'an and Sunna there is no disagreement about them among scholars. The second type of penalty is discretionary. This can range from a simple caution to capital punishment, and includes fines, imprisonment, and public humiliation.

Another example of the realistic nature of the Sharia is that while it actively promotes peace, it recognizes that war is an inevitable aspect of human existence.

> For if God had not defended people against one another, monasteries, churches, synagogues and mosques, where the name of God is mentioned a lot, would have been pulled down" (22:40).[43]

According to the Sharia, jihad is obligatory. The rules governing it have received wide attention by jurists. We find the same practical approach in the rules governing divorce and polygamy. Some people are not sucessful in their marriages. It is unreasonable to advise them simply to show patience in their relationships, especially in the case of marriage, which is a life-long and intensely personal commitment. To live with someone with whom you have nothing in common, and from whom you have no relief, is the worst of misfortunes. The Arab poet al-Mutanabbi, said, "The bane of the free man is to have an enemy whose friendship is unavoidable."

The Sharia has allowed divorce but considers it as the furthest limit of permitted things. It also imposes rules and restrictions to prevent the abuse of divorce, which should be sought only when all else fails. According to popular wisdom, "If there is no harmony, then separation is better." The Qur'an says,

> And if the two separate, God will provide for each from his plenty. God is Resourceful, Wise (4:130).

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43. "And if it were not for God's defence of the people, some of them by others, the earth would have rotted" (2:251).

According to the Sharia, it is better for men to marry more than one woman than to establish sexual relationships outside marriage. In societies which forbid plural marriage by law, extra-marital relationships are often tolerated, or even accepted as normal. Usually, however, these relationships lack the moral and legal responsibilities of marriage and people involved in them, and children born of them, sometimes face legal or social discrimination.

The realistic nature of the Sharia can be seen in its admission that it is impossible for a man to treat his wives equally in every way. It therefore requires equal treatment of co-wives in matters where equal treatment is possible, such as in the provision of food, clothing, and shelter, physical companionship and even the frequency of sexual intercourse. Equal treatment of co-wives does not apply to the things that are beyond human control, such as the degree of love and attachment one feels toward each of them.[44] Referring to his wives the Prophet used to say, "My Lord, what I have is what I have been given, so do not blame me for what You have that I do not," by which he meant command of the heart.[45]

The Sharia recognizes that human needs my take precedence over legal necessities. Such pressing needs may be either individual or collective. Either way, the Sharia waives ordinary prohibitions in the face of dire necessity. Thus, under certain circumstances the Sharia suspends restrictions regarding food and drink, clothing and commercial transactions and so on. The Qur'an provides the authority for these exemptions. For example, following its description of dietary prohibitions the Qur'an declares that a person who violates these out of necessity will not be blamed. The Qur'an repeats this four times.[46] Although men may not wear silk, when Abdul Rahman ibn Auf and

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44. "You will not be able to deal equally between wives, however much you wish. But do not turn altogether away (from one), leaving her hanging. If you do good and fear God, then God is forgiving, merciful" (4:129).

45. Tirmidhi, II (40), 304 (no. 1149).

46. Also, "But whoever is driven by necessity, neither craving nor going to excess, it is no sin for him." (2:173); "And whoever is forced by hunger, not by will, to sin, then truly God is Forgiving, Merciful (5:3)"; "...except for whoever is forced, unwillingly and without disobedience, for truly your Lord is forgiving, merciful (6:145)"; "But whoever is forced to, without craving it or sinning, then God is Forgiving, Merciful" (16:115).

al-Zubair ibn al-Awam complained to the Prophet about cronic itching, he told them they could wear it.

The Sharia takes account of the society's changing nature. When change is for the worse, scholars may refer to it as the "trials of the times." Change, however, is sometimes positive. Islamic jurists recognize this and admit that legal rulings should be revised to take account of changing social conditions. The authority for this comes from the Sunna of the Prophet, who instructed us to follow the guidance of his rightly guided successors and of his companions. Not only the Sunna, but also the Qur'an, strongly supports this attitude toward change and appropriateness to changed situations. We shall examine this matter in detail in the following chapter.

We can see the realistic nature of the Sharia again when we consider how the law regards allegiance to the ruler. Even though there may be another man better qualified and more able to rule, this fact does not affect the obligations of loyalty to the leader. The preservation of order, and the defence of public welfare both require this. Sharia law requires obedience to political rulers regardless of their weaknesses. This is in order to preserve national unity and to prevent bloodshed. So long as the ruler is a believer, loyalty to him is obligatory. Disbelief of the ruler must be proven with the Book of God. Even then, armed rebellion against him is prohibited if this will result in greater suffering than is inflicted by his rule.[47] It is on this basis that jurists founded the doctrine of the "rule of the conqueror," even though the legal authority to rule rests in public election and approval, and in the voluntary offering of allegiance.

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47. Imam al-Shatibi explains that it is impossible to fulfill the obligation of jihad without a leader. While it is desirable for a leader to be just, justice is not an essential quality of leadership and our desire for justice must not prevent us from fulfilling our obligations. Because of this, the Prophet ordered us to follow the unjust ruler in times of strife. Al-Shatibi quotes the Prophet , "Jihâd is obligatory upon you under the command of every leader whether he be pious or impious; prayer is obligatory upon you behind every Muslim, whether he be pious or impious—and even if he commits grave sins; prayer is obligatory upon every Muslim, whether he be pious or impious—and even if he commits grave sins." Although this hadith is weak (*daᶜîf*), it conforms to the practice of the early generations of the Muslims. See Shâtibî, Ibrâhîm b. Mûsâ b. Muhammad (d. 790/1388), *Kitab al-Muwâfiqât fî usûl al-sharîᶜah*, II (Cairo: Maktabat al-Tijârîyah, n.d.), 15, and Abû Dâ'ûd, III, 18 (no. 2533). [For further discussion of this hadith see Muhammad Nasr al-Dîn al-Albânî, *Daᶜîf sunan Abî Dâ'ûd*, 249. *OJ.*]

The Sharia requires us to take the least harmful course of action. We must be patient with the way things are if moving to change them will make things worse. For example, the Prophet wanted to rebuild the Ka'aba but later decided against it. A'isha said she heard the him say, "I would have demolished the Ka'aba and rebuilt it on the original foundations laid by Abraham had your people [the Quraish] not only recently entered Islam." Since the people of Makkah were still close to disbelief, the Prophet preferred not to try their faith by doing this.[48]

One of the Sharia's central concerns is the relief of hardship. Laws must be easy to live by and enforce. One of the supplications in the Qur'an reads, "Our Lord, do not burden us with what we do not have the strength to bear!" (2:286). The Prophet said that God had accepted this prayer, and added, "I have been sent with a religion of truth and goodwill."[49] He also said to his Companions, "You have been sent to make things easy, not to make things difficult."[50] The Qur'an confirms this attitude in several verses.[51] Ibn Nujaim (d. 970/1563) believes that all dispensations and special exemptions in the Sharia depend upon the relief of hardship. For example, he explains,

> It is permissible to perform the obligatory prayer sitting while aboard ship if there is a risk of dizziness, even if one may be able to stand. The fast is for one month out of twelve, the pilgrimage is once in a lifetime and zakat is two and a half percent. All of this is in the spirit of ease.
>
> Divorce, too, is intended for the relief of the hardship incurred when two people are obliged to remain together in the face of continuous animosity and disagreement. Women may petition for divorce themselves, or obtain it upon payment of a consideration. It is also easy to annul a divorce within three months of its pronounce-

48. al-Bukhârî, II (25/42), 155.

49. Ahmad, V, 266.

50. al-Bukhârî, I (4/58), 61.

51. Also, "God wants you to have it easy—He does not want you to have it hard..." (2:185); and "God does not want to place a burden on you..." (5:6); "[God] has not set any hardship in the faith..." (22:78); "That is an easing from your Lord and a mercy" (22:78); "God wants to lighten the burden for you, for man was created weak" (4:28).

ment, so long as it is not an irrevocable, third divorce: the limit of three times is intended to protect women from a repeated threat.

The Sharia allows the making of wills so that the faults committed in life may be corrected, but a person's heirs must still approve any changes made to a will. To protect them from potential loss, no more than one third of an estate may be disposed of in this way.

God will not call to account those who unsuccessfully make a sincere and competent effort to discover the correct course in law. To be allowed to act positively on the strength of an informed opinion is to make the law easy to follow and carry out. If we were always required to act in absolute certainty, we would surely fall short of our goal.[52]

Special Exemptions and the Flexibility of the Sharia

Jurists mention several situations or circumstances which provide exemptions from normal obligations. These include illness, travel, compulsion, error, forgetfulness, and necessity.

Ibn Nujaim has classified special exemptions into seven categories. The first category is the total suspension of obligations in certain circumstances, known as *isqât*. For example, since prayer is offered on a regular schedule, women are exempted from it when menstruating (and do not have to make it up later). The same rule applies to someone who has been unconscious for more than twenty-four hours, and to those so ill that they are unable even to move their heads.[53]

The second category is a reduction of obligations, *tanqîs*, such as shortening the prayer while traveling,

The third is the substitution of one form of observance for another, *ibdâl*. For example, when there is no water, one may perform ablution before prayer using clean soil instead.[54] If one prays sitting, a nod followed by a shallow bow replaces a deep bow followed by a prostration. Sometimes, a person can feed others instead of fasting.

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52. Ibn Nujaim, Zain al-Dîn ibn Ibrâhîm, *al-Ashbâh wal-nazâ'ir*, (Damascus: Dâr al-Fikr, 1983), 84, 87-90 *passim*.

53. ibid. 84.

54. This is called *tayâmmum* in law books.

The fourth category is called advancement, or *taqdîm*. This means to complete a ritual obligation before its appointed time, such as praying Noon and Afternoon prayers together at Arafat when performing the Pilgrimage, or performing two prayers together when traveling. It is also possible to pay the poor tax, or zakat, before it is due, so long as the liability to pay it is certain. This also applies to *zakat al-fitr*, due at the end of Ramadan. According to authenticated *(sahih)* hadiths, this can be paid even before the beginning of Ramadan so long as you are able to pay and a suitable recipient is available.[55]

The fifth is to delay something beyond its appointed time, *ta'khîr*. Thus pilgrims combine sunset prayer with the night prayer at Muzdalifeh, a place near Makkah. During the Pilgrimage, fasting may be delayed for the sick and for travelers, and the prayer may be delayed if it is not possible to interrupt what you are doing, as in the case of rescuing people from danger.

The sixth category Ibn Nujaim mentions is special dispensation, or *tarkhîs*. This includes such things as the use of alcohol for medicinal purposes and allowing a person who, because of a lack of water, has not been able to clean himself completely after defecating to perform the obligatory prayer.

The seventh and last category is change, called *taghayyur*. This refers to a change in an established pattern of ritual events. For example the way the cannonical prayer is communally performed may be altered on a battle field when, in the face of an agressive force, the congregation may be split in half. One group of men prays while the other stands watch. The prayer is thus completed in two shifts. This is called the prayer of fear.[56]

Adoption of Gradual Approach to Change

The Sharia has adopted a gradual approach to imposing obligations and restrictions. This underscores the realistic nature of Islam and its flexibility in dealing with human beings.

When God first prescribed prayer, fasting, and alms-giving, He introduced them in stages. The prayer consisted of two sets of bows

55. Ibn Nujaim, *al-Ashbâh wal-nazâ'ir*, 94.

56. ibid. 92.

(rak'at) and this is still the way travelers pray today. Later, God increased the number of bows to four in the midday, afternoon, and night prayers.

Fasting was at first voluntary. Whoever wanted to fast would fast, and whoever didn't want to fast, would have to feed a poor person every day instead. This was what Imam al-Bukharî related about Salamah ibn al-Akwa's explanation of the verse:

> And for those who can afford it, there is a substitute, the feeding of a man in need. But whoever does good of his own free will, it is better for him. And it is better for you to fast if you only realized it (2:184).

The obligation to give alms was first announced in Makkah. At this stage it was unregulated and not linked to any time limit. When and how much to pay was left to conscience. The poor-tax, or zakat, we know today with its specific quantities and time limits was introduced later in Madinah.

Prohibitions were not established all at once either. Behavior that is deeply rooted can take time to change. It was not possible to free people from the grip of a common practice by a sudden command. Instead, God prepared them psychologically and mentally before announcing prohibitions absolutely. When this was finally done, the Muslims complied immediately and without difficulty. The clearest example in this respect is the often-related prohibition of alcohol.

To apply the Sharia to Islamic society today, we must follow this system of gradual change. We live in a world where cultural, legal, and social aggression is routinely directed against Islam. If we want to establish a truly Islamic society, we should not delude ourselves into believing that this can be achieved with the stroke of a pen, a royal decree, or a parliamentary decision. Such a society must come into being gradually, as a process of intellectual, psychological, moral, and social development. We must find suitable legal alternatives on which to base the Islamization of long established social institutions. By gradual change, we do not mean to put things off, nor to defer the reestablishment of the Sharia. Rather, we need a sincere and serious program of change, each step of which leads to a higher level in a carefully planned and organized way. Our final aim must always be the complete and exclusive establishment of the Sharia within the context of a truly Islamic society.

The Prophet's approach was to transform the life of disbelief, called *jâhilîyah*, into the life of Islam. He stayed in Makkah for thirteen years, confining his mission to raising a faithful generation who would be able to bear the burden of the Message and fulfill the obligations of jihad, to protect and propagate Islam in the world. This is why the Makkan period was a time of education and preparation rather than legislation and codification. The Qur'an addressed matters of belief and faith, and directed itself to the moral and spiritual development of the Muslims, long before any mention was made of law.

It is instructive to note the words of Omar ibn Abdul Aziz, the fifth of the "Rightly Guided Caliphs"[57] replying to his son Abdul Malik, a deeply pious young man, who had asked his father, "Why don't you enforce the law strictly? It doesn't matter to me if you and I are both killed on the path to truth!" Of course the boy wanted his father, whom God had entrusted with the leadership of the Muslims, to put an end to dishonesty and corruption at a single stroke, without patience or deliberation, and let come what may! Omar told his son, "Have patience my son! You see, God criticized the drinking of alcohol two times, then He prohibited it. I am afraid that if I impose the burden of truth on the people with a single stroke, they would abandon it just as quickly. Then the law would be a source of strife."[58]

The Caliph wanted to handle things prudently and gradually, and was guided by the Qur'anic example of prohibiting intoxicants. He wanted to lead people toward truth gradually, not rashly. This is the mark of true understanding.

HUMANITY

The Sharia is a humane and universal law. It has been established for the good of man. It raises mankind in stature and encourages and nurtures the human aspects of man's character, while at the same time guarding him from his own bestial instincts. The essence of the human being is a spiritual soul that inhabits a material body. Ritual worship

57. "Sufian al-Tharwi said, 'The Caliphs are five: Abu Bakr, Omar, Othman, Ali, and Omar ibn Abdul Aziz, there has not been another like them.' Al-Shafi'i said the same," Ibn al-Athîr, Muhammad b. Muhammad b. ʿAbd al-Karîm (d. 637/1239), *al-Kâmil fi al-tarîkh*, VI (Beirut: Dâr al-Kitâb al-ʿArabî, 1983), 164. *OJ.*

58. See al-Shâtibî, *al-Muwâfiqât*, II

gratifies human spiritual needs since people are more than flesh and blood.

The Sharia preserves man's dignity, a dignity that was not bestowed on him by a president or a parliament. It is God Who gave this to mankind and made humanity his vice-regent on earth. God commanded the angels to bow to man and mentions this honor in the Qur'an, saying, "We have indeed honored the children of Adam" (17:70). When we look at the legal foundations of the Sharia, we see that it recognizes human dignity from birth to death, and even before birth and after death.

Despite its attention to the spiritual character of man, the Sharia does not neglect his material and physical needs. God urges us to travel to seek His bounty and to work to make this planet a better place to live. The Sharia also sanctions the enjoyment of life's beauties and of the good things that God created. The Sharia recognizes the human sexual urge and its influence on behavior, and so men are permitted to marry women of their choosing so long as they are able to fulfill the responsibilities of marriage.

Not only this, but the Sharia enjoins the whole community to care for these needs. No one in the Muslim community may be deprived of the basic needs of clothing, housing, marriage, and health care. If a person does not have enough money to satisfy these needs, the community helps him. He has a right to money from his family if they can afford to give. He may qualify for zakat, or for help from a special government fund.

The Sharia cares for man as a whole: mind, body and spirit. It commands him to be fair with his body by not exhausting it, not even in worship. The Prophet said, "Surely your body has a right on you."[59] The Sharia established a right to medical treatment also. The Prophet said, "God, glorified and exalted is He, did not create any disease for which there is no cure. Some may know it, and some may not."[60] In caring for the mind, the Sharia requires the pursuit of knowledge and supports this in every way, making earnest study an act of worship.

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59. al-Bukhârî, II (30/55), 245.

60. Ahmad, I, 413.

The Qur'an praises scholars and invites everyone to ponder God's creation of the universe.

The Sharia discourages blind imitation and dependence on supposition, and prohibits all drugs that impair the mind. It commands every human soul to worship God without the mediation of priests or shamans. Everyone holds the key to salvation in their own hand. "Whoever has purified it has succeeded indeed, and whoever has corrupted it has failed indeed" (91:9-10). This is why the five essential interests are the preservation of religion, self, mind, offspring, and property.

When we say that the Sharia is humane, we mean that it applies to all mankind regardless of sex, color, nationality, or class. Even though it was brought by an Arab, and revealed in the Arabic language, it is a universal guidance for all humanity, not an Arab law. It is the law of the God of all humanity, for all humanity, revealed in the universal book, the Qur'an, whose revealer says, "Blessed is He Who has sent down the standard (of right and wrong) to His servant to be a warner to the worlds" (25:1).

The first verse following the invocation of God's name is "Praise belongs to God, the Lord of the Worlds" (1:2). In the final chapter of the revelation, God says, "Say, 'I seek refuge in the Lord of mankind, The King of mankind, The God of mankind..." (114:1-3). With it the universal Prophet was sent, "We did not send you except as a mercy for all beings" (21:107).[61]

Fathi Ridwan believes that universality means that all the inhabitants of this planet make up a coherent and indivisible whole.

> Another deed, another system, or another law may be as humane as the Sharia , but it cannot be as universal. A decision may be made by a village or a tribal chief who, rather than thinking of mankind, thinks only of the village he lives in and governs. Islam is universal because it is humane. It does not make distinctions among people except in piety, abstention from evil, and commitment to good, and does not discriminate between people. The inalienable rights of human beings include freedom and honor.[62]

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61. See also 7:158, "Say (Muhammad) 'Mankind! I am the messenger of God to you all.'"
62. Fathi Ridwân, *Falsfat al-tashrîᶜ al-islâmî*, (Cairo: Dâr al-Kitâb al-ᶜArabî, n.d.), 154-5.

Islam forbids all types of discrimination, whether these are based on race, religion, color or class, and addresses all people, since all people are servants of the One God Who created them. They are all descendants of one man and one woman. The bond that ties people together is their love for God and common descent from Adam and Eve. God says,

> Mankind, fear your Lord Who created you from a single soul and from it created its mate. And from those two, a great number of men and women have spread. Fear God by Whom you make claims on one another, and respect the wombs (that carried you). For God is watching over you (4:1).

How right the word "wombs" is in this verse that addresses all people, and reminds them of the single soul from which they were all created. How right it is when this word is intended to mean, among other things, the general human bond, as the beginning of the verse says. God also says,

> Mankind, we have created you from a male and a female, and have made you into nations and tribes for you to know one another. The noblest of you with God is the most Godfearing. God is All-Knowing, All-Aware (49:13).

This verse does not rule out the existence of races and nations, but it urges people to remember their roots and to be aware of the reason for the differences between them. They should know each other and cooperate with one another, not struggle against each other and fight. The Prophet called on all people to accept one another as brothers and warned Muslims against being arrogant or aggressive toward one another. Brotherhood is such a permanent principle in his Message that he used to beseech God after each prayer saying,

> God, our Sustainer, and Sustainer of everything! I bear witness that you are the One, alone. God, our Sustainer, the Sustainer of everything! I bear witness that Muhammad is Your servant and Your Messenger. God, our Sustainer and Sustainer of everything! I bear witness that all people are brethren![63]

63. Abû Dâ'ûd, II, 83 (no. 1508).

Thus, the three principles which the Prophet repeated at the end of every prayer are:

1. There is only one God and nothing else may be associated with Him in any way. Muslims must deny all other gods.
2. Muhammad is the servant and the Messenger of God. He is neither God nor the son of God, but a human messenger who conveyed the Message of his Lord. He did not act on his own.[64]
3. All people are brothers. There can be no bias, no discrimination, no arrogance, no aggression, no hatred, no envy and no strife between them.

If we understand that God is One God and the Message of Muhammad is accepted, then those who make gods out of themselves on earth will collapse and the oppressed will rise victorious under the banner of monotheism. The bond of worshiping the single God is the only clear basis for the lasting unity of mankind. That is why Prophet Muhammad said, "I bear witness that all people are brethren."[65]

INTEGRITY

Integrity means the working of the parts of a whole in an orderly way toward a common goal. A single and integral entity consists of many parts. These parts must be in harmony with each other. Integrity is at once a natural phenomenon and a legal concept. We can see this integrity in everything that God has created and in everything that He has commanded. Anyone who thinks about the natural world must be amazed by its wondrous harmony. The creation of the heavens and the earth, the creation of man, of animals, of plants, and of all things, defies comprehension. The stars and planets, massive and distant, have for millions of years been plying the skies in their natural orbits. They neither collide haphazardly nor drift aimlessly about. God confirms this and says,

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64. "Say, 'I am only a human like you. My Lord reveals to me that your God is one god. And whoever hopes for the meeting with his Lord, let him do righteous deeds, and associate none in the worship of his Lord'" (18:110).

65. Abû Dâ'ûd, II, 83 (no. 1508).

> A sign to them is night. We withdraw it from the day, so then they are in darkness. And the sun runs on to a point of rest for it. That is the decree of the Almighty, the All-Knowing. And the moon, We have measured it in phases until it returns like a curved date stalk. It is not for the sun to catch the moon, nor does the night win over the day. They each swim in an orbit (36:37-40).

A close look at the Sharia will show that its provisions compliment rather than contradict one another. The Sharia has high regard for women. It cares for the humanity of women and declares that women's religious obligations are the same as those of men. The Holy Qur'an says, "You come from one another" (3:195) and the Prophet said, "Women are the full sisters of men."[66]

The Qur'an's provision that women inherit half as much as men should not lead us to conclude that the Qur'an is unfair to women or diminishes their status in any way. On the contrary, it guarantees each person their due in proportion to the duties and financial obligations they must bear. The Qur'an says, "God orders you concerning your children: to the male the equivalent of the portion of two females..." (4:11).

Islam puts women under men's custody but does not place any financial obligation on them. Before marriage a woman is under her father's or guardian's care. After marriage she becomes the responsibility of her husband who must provide for her material needs however rich she may be. In addition to this, men must pay their wives a previously agreed amount of money upon marriage, which becomes their property. By doing this a man is financially losing while his wife is gaining in many respects.

Let us assume that a man dies and is survived by a son and a daughter. His entire estate is worth three thousand dollars. From this, two thousand would go to the son, and one thousand to the daughter. What is likely to become of each one's share? The son, will probably marry later and might have to give his wife five hundred dollars upon marriage, and with the remaining five hundred furnish a house. In the end, he would have only one thousand dollars, exactly his sister's

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66. Abû Dâ'ûd, Tirmîdhî, Ahmad.

share of the inheritance. The thousand that went to the daughter will remain intact. When she gets married, she could receive a dowry of five hundred dollars from her husband. In this case she would end up with more than her brother's share. The laws of inheritance and maintenance, and the law of dower compliment one another.

This same harmony is reflected in all creation. We see this harmony again when we consider concepts of legal liability. For example, the Sharia did not lay the responsibility for accidental murder upon the killer alone. Responsibility for payment of compensation, known in Sharia law as *diya*, rests with his family. For this purpose, one's family includes most close relatives through the male line, as well as immediate members of one's extended family. Payment of compensation may be made in installments over a period of three years, and each relative will be expected to pay according to his ability. The Sharia achieves a number of its objectives in this way.

It is fair to the killer, who should not suffer excessive financial burden for a crime he did not intend to commit, and it insures that every family bears responsibility for its own members. Control, discipline, and restraint must begin at home: a family that is indifferent to its members' behavior will suffer for their neglect. It insures that compensation reaches the family of the deceased: one man may not be able to pay it alone and in this case the bereaved family risks losing their rights.

Some people may ask why a whole family should bear an obligation to pay death compensation when they had no hand in any wrongdoing. The explanation for this is clear when we consider the principles of the Sharia globally. The same relatives who are collectively responsible for one another before the law also have a collective right of inheritance. This is the right they gain in exchange for the criminal responsibility they mutually bear. By virtue of this family connection poor relations have a claim on their richer relatives' wealth, at least in the view of some scholars. They support this with the verse, "The (father's) heir has to do the same (as the father)" (2:233).

The Sharia clearly links rights to obligations. Each right compliments a duty, and each loss offsets a gain. The loss resulting from the payment of death compensation and the obligation to share responsibility for it is made up for by a right to inheritance. Maintenance, on the other hand, is the right of the incapable against the capable. Thus,

by the law of equity members of the same family exchange rights and obligations, losses and gains, each according to his own situation.

Many people have only a partial understanding of the legal principles that form the foundations of Sharia law. Had they made a careful study of Islamic jurisprudence they would probably have come to different conclusions. The shortsighted, shallow approach of many critics of the Sharia has lead to a serious misunderstanding of it, and to an inability to grasp it as a complete and comprehensive system of law. Anyone who studies the Sharia carefully, who seeks out those who really do know, and whoever tries to understand the principles upon which the law rests, will realize that this is a brilliant body of law that reflects the sublime perfection of its Revealer.

COMPREHENSIVENESS

The Sharia covers the whole range of human activities. It covers the laws of religion and ritual, which pertain to purification, prayer, fasting, pilgrimage, the sacrifice of animals and their proper slaughtering, the making of vows, and many other things that fall beyond the reach of ordinary legislation. It also covers family law, including marriage and its responsibilities, divorce and child custody, the drawing up of wills, the division of inheritance, and other matters that relate to the protection of family life.

The Sharia covers commercial law and regulates business and financial transactions, including different types of sales and the leasing and morgaging of land and property, business arrangements such as partnerships, trusts and pledges, and financial services such as loans. It also regulates speculation, the right to use the property of others, the making of gifts, the procedure for returning lost property, and the fulfillment of commercial and financial obligations. The Sharia sets limits and conditions that must be observed in these dealings and defines practices that must be avoided. Sharia law covers economic and financial affairs and regulates the revenue and expenditures of the central bank or treasury. It provides for assistance to the poor from public funds and from the property of the rich. It also enforces economic prohibitions such as the abolition of bank interest and of monopolies.

Zakat, besides being a fundamental act of worship, is also an important part of the Islamic financial and social system. The Sharia covers criminal law and sometimes prescribes specific punishments, such as

retaliation for murder, amputation of the hand for theft, flogging or stoning for unlawful sexual intercourse, and flogging for drunkenness and slander. In other cases, courts may impose certain discretionary penalties, called *ta'zîr*. The Sharia includes the laws of procedure for such things as the acceptance of testimonies, claims, oaths and concessions, and the qualifications of witnesses. It establishes a correct procedure for the settlement of disputes. The Sharia contains constitutional law to establish the system and rules of government, a procedure for the selection of the head of state, and a procedure for his legal removal. Furthermore, it defines the duties and obligations of the leader to the public, and the obligation of public obedience to him.

Finally, the Sharia includes international law, to regulate relations between the Islamic state and other nations, both in times of peace and of war. This includes the rights of non-Muslims who live within its borders. Classical jurists included this body of law with the rules governing jihad. Modern jurists consider it to be within the domain of international relations.

All these aspects of the Sharia represent an integral part of Islam. This means that these things must be observed and obeyed. It is not permissible for a Muslim to reject any part of the Sharia.[67]

This is why the Qur'an always addresses the nation in terms of these laws—whether they relate directly to God, such as prayer and fasting, or to matters of living and social transactions—and offers guidance in all these matters. When the Qur'an addresses Muslims it says, "You who believe." God has decreed legal principles, which must, therefore, be observed, obeyed and implemented. The degree to which this is done is a measure of each Muslim's commitment to his faith.

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67. "And it is not for believing men or women, when God and His Messenger have decided an affair, to have any choice in their affair. And whoever disobeys God and His Messenger, he indeed has clearly strayed" (33:36). [The author refers here to the Sharia in the abstract sense of divine law, not in the sense of a law based on a human interpretation of the revalation. When he says it is not permissible for a Muslim to reject any part of the Sharia, he means Muslims may not deny the revelation (which includes the Sunna) or its binding nature. As for the opinions of jurists, the author points out more than once that these are not necessarily binding on anyone. *OJ.*]

3

INTERESTS AND THE OBJECTIVES OF THE SHARIA

The Sharia is founded on rules that guide it toward achieving its goals. These rules are logical and understandable, and are never arbitrary. While there are things in the Sharia that we may not fully understand, these are normally confined to ritual practice.[1]

The aim of the Sharia is to protect and maintain the interests of human beings in this world and the next. Scholars have spoken of three kinds of interests, those that insure something vital, those that relieve a burden, and those that improve a situation.[2] This classification of interests is neither supported by the Qur'an and Sunna, nor by the consensus of the scholars. Rather, it is the result of the work of scholars whose concern it was to present the Sharia in a logical and comprehensible way.

The first category of interests—those that insure something vital—relates to things that are indispensable to daily and spiritual life. If these interests were not maintained it would be impossible for man-

1. The purpose of many daily rituals is explained in The Holy Qur'an. For example, at the end of the verse that prescribes *wudu'*, or ritual ablutions before prayer, God says, "God does not want to place a burden on you, but He wants to purify you and perfect His favor to you, that you may give thanks" (5:6). On prayer we read, "Recite whatever of the Book has been revealed to you, and establish prayers; for prayers prevent filth and evil" (29:45). On zakat we read, "Take alms from their wealth to purify them and make them grow by them, and pray for them" (9:103). On fasting we read, "Fasting has been written for you, even as it was written for those before you, so that you might fear God," 2:183. On pilgrimage we read, "To witness the benefits for them" (22:28).

2. See also al-Shâtibî, *al-Muwâfaqât*, II, 6; and al-Ghazzâlî, Muhammad b. Muhammad, Abû Hâmid (d. 505/1111), *Kitâb al-Mustasfâ min ʿilm al-usûl*, I (Cairo: Bulâq, 1322 h.), 286-7. [The three categories of interests mentioned here are: interests that insure something vital, *darûriyah*; interests that relieve a burden, *hâjîyah*; interests that improve a situation, *tahsînîyah*. *OJ*.]

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kind to strike a natural balance in the world: humanity would slide into corruption and degradation in this life, and would have no hope of success or reward in the next.

We can protect these interests in two ways: first, by reinforcing the basic principles upon which they depend, and second, by avoiding actual and potential threats to them. The first category of interests includes six essential objectives: preservation of mind, religion, the inner self, children, wealth,[3] and honor. These are so important that our very existence depends on them. It was for the preservation of these interests that the Quranic sanctions, or *hudûd*, have been imposed. For example, the protection of people from bodily harm is assured by the right of retaliation for unlawful killing. Similarly, intoxicants were prohibited to protect the mind, and apostasy was forbidden to protect religion. The interests of children support the prohibition of adultery. The protection of private property demands the prohibition of theft. The protection of personal honor and dignity lies behind the prohibition of slander. The Prophet ordered us to defend these things above all else. Sa'id ibn Zaid reported that the Prophet said, "He who is killed in defense of his property is a martyr, he who is killed in defense of himself is a martyr, he who is killed in defense of his religion is a martyr, and he who is killed in defense of his wife is a martyr."[4]

The second group of interests are those that relieve a burden. This group includes such things as the possibility of praying while sitting or lying down, and the option, in certain cases, of breaking the fast of Ramadan. These things help us to fulfill our normal obligations.

The final group of interests, those interests that improve a situation, includes things that relate to public life and the development of good

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3. al-Shâtibî was afraid that people would think that wealth was confined to gold, silver, and other forms of money including cash. He opposes this view and says that wealth *(mâl)* "is any kind of property that can be held in exclusive ownership. This includes things such as food, drink and clothes of various description, as well as any other commodity or medium of exchange that can be used to buy these. Such things are the necessities of life . . . Certainly the life of the world is a provision for the hereafter." See *al-Muwâfiqât*, II, 17. *OJ*.

4. al-Albâni, Muhammad Nasr al-Dîn, *Sahih al-jâmi' al-saghir wa ziyâdatihi [al-fath al-kabir]*, V (Beirut: al-Maktab al-Islâmî, 1983), 335 (no. 6321).

character, such as the adoption of good habits and the avoidance of anti-social and self destructive behavior.[5]

Each of these categories complements the one above it. Thus, the lowest category of interests, those that improve a situation, complements the second category, those that relieve a burden, and these in turn complement the highest category, those that insure something vital.[6]

THE GENERAL VIEW OF INTERESTS

According to the Sharia, interests extend from this world to the next and are both personal and communal. The Sharia seeks to balance interests on all levels, whether they relate to individuals or the community, to this world or the next. To reach an equilibrium between personal and public welfare, the Sharia balances temporal and sacred matters, the affairs of the nation and those of humanity, the well-being of this generation and that of generations to come. The task of the Sharia, then, is to achieve harmony and order between mutually conflicting goals. This task is greater than what human beings are capable of alone, whether in terms of knowledge, of wisdom, or of power. This is only natural since people are limited both in knowledge and in reason. Each of us inhabits a narrow world in time and space. We all have our own interests at heart, which we are pushed to promote without regard for the desires or needs of others. Whether or not we are aware of it, our humanity, our belonging to a family, to a community, and to a nation, is itself an obstacle to fairness and the protection of the interests of others. No one can have anything but a narrow view of the problems confronting them and their potential solutions. Much more is hidden from us than is apparent to us, and in our ignorance we may actually do ourselves harm. Only God understands the circumstances each of us face. Whoever rises above himself has been raised up by God.[7]

The Sharia, therefore, aims to protect individual and communal welfare. It protects the whole person, in mind, body, and soul. It protects entire classes of people, rich and poor, rulers and ruled,

5. al-Shâtibî, *al-Muwâfiqât*, II, 11, *passim*.
6. ibid. II, 18.
7. ibid. I, 349.

employers and employees. It protects all humanity, black and white, men and women, and every generation, past, present, and future. Only God is capable of providing comprehensive protection for His creatures' many conflicting needs. To illustrate this, let us look at a well known example from the early history of Islam.

In the days of Omar ibn al-Khattab, Muslim armies entered Iraq. After they had conquered the Sawad, Omar refused to distribute its captured lands among the Muslim soldiers, reversing an established legal precedent.[8] Omar believed that land redistribution in Iraq favored the interests of the present generation at the expense of future ones, and said that if he distributed this land among the Muslims, future generations would get nothing.[9] Omar defended his position before the Prophet's Companions, some of whom insisted that he do as the Prophet had done and distribute the captured lands in Iraq.[10] He cited this verse of the Qur'an to support his position,

> And those who came (into the faith) after them say, "Our Lord, forgive us and our brothers who came into the Faith before us, and do not put any spite in our hearts toward those who believe. Our Lord, You are Pitying, Merciful." [11]

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8. The incident relates to the conquest of the fertile lands of southern Iraq, called al-Sawad. This is a region contained within a triangle formed by the cities of Karbala on the Euphrates, Wasit on the Tigris and extending southward to the confluence of the two rivers at Shatt al-Arab [Bacharach, *A Near East Studies Handbook*, (Seattle, 1974), 57]. The area was known to the desert Arabs both as al-Sawad and al-Rustaq. Both words indicate a heavily populated and cultivated land, and invoke the image of a green fields, trees and date groves. [Yaqût b. ᶜAbdullâh al-Hamâwî (d. 962/1229), *Muᶜjam al-buldân*, III (Beirut: Dâr al-Sâdir, 1979), 272]. *OJ*.

9. See Abû Yûsuf, Yaᶜqûb b. Ibrâhîm b. Habîb al-Kûfî al-Ansârî (d. 182/798), *Kitâb al-kharâj*, (Cairo: Dâr al-Salafiyah, n.d.). 112 (secs. 16, 17)

10. Some of the Companions supported Omar's position. For example, Mu'adh ibn Jabal advised him, "If you divide it, the greater part will fall to the hands of a few who will pass away and leave to one man or one woman, then those who strive in the defense of Islam will find nothing. So bear in mind that this matter concerns those who are with us and those who are yet to come. Abû ᶜUbaid al-Qâsim b. Sallam (d. 224/838), *Kitab al-amwâl*, ed. Muhammad Khalil Harâs (Cario: Dâr al-Fikr, 1981) 57-61; Mu'âdh is reported to have been the most knowledgeable of the Companions in matters relating to the lawful and the prohibited.

11. The Holy Qur'an 59:10; For Omar's interpretation of this verse, see Abû Yûsuf, *Kitâb al-kharâj*, 117, (para. 20).

deal with them on a preferential basis. In the hierarchy of interests, interests that ensure something vital take precedence over those that relieve a burden. Likewise, those that relieve a burden are more important than those that improve a situation. When there is a conflict between two groups of interests the order of precedence is clear.

Interests within a single group are also assigned priorities. For example, within the first group of interests—those that insure something vital—scholars have mentioned six imperatives. Here, the preservation of religion takes priority over the preservation of life, life takes priority over property, and so on. If someone is given the choice between life or property, he would naturally choose life. In the case of being offered life in exchange for one's faith, however, faith must be given priority. This is clearly the case in jihad, where one's life may be sacrificed for the sake of religion. This point appears again in the execution of apostates, where life is the price one pays for abandoning religion.[14]

The same principle guides Muslims to choose a lesser harm if this will help us to avoid what is worse. This principle is illustrated in the Qur'an, in which we are told of Khidr, a companion and teacher of Moses, who sank a boat he was riding in, clearly inflicting damage. Later, he explained to Moses that the boat was owned by fishermen who depended on it for their livelihood. He knew that a local ruler was confiscating all boats of the area and so he sank it to save it for the fishermen, who could recover it once the danger had passed.[15]

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14. al-Shâtibî, *al-Muwâfiqât*, II, 39.

15. The account may be found in The Holy Qur'an 18:64-82: "He said, "This is what we've been seeking." So they returned retracing their steps. Then they found one of Our slaves, whom We had given mercy from Us and taught knowledge from Us. Moses said to him, "Can I follow you so that you may teach me some of what you've been taught of the right way?" He said, "You won't be able to be patient with me."How can you have patience with what's not been within your experience?" He said, "You'll find me, God willing, patient, and I won't disobey you in any matter." He said, "Well if you follow me, don't ask me about anything until I mention it to you." So the two went off till, when they were in the boat, he scuttled it. (Moses) said, "Have you scuttled it to drown its passengers? You've really done something awful." He said, "Didn't I say that you couldn't be patient with me?" (Moses) said, "Don't take me to task because I forgot, and don't overburden me with something too difficult for me." So both went on till, when they met a boy, he killed him. (Moses) said, "What! Have you killed an innocent soul for other than killing another? You've really done something horrible." He said, "Didn't I tell you that you couldn't be patient with me?" (Moses) said, "If I ask you about anything else, do not keep company with me. You've already

According to the principle of priority of interests, when a choice has to be made between doing harm to a single person and harming a larger group, the collective interest prevails over the personal one. This is because the protection of the individual depends on the protection of the community, and if the group suffers, each individual will suffer with it. A single person's interests cannot be preserved by sacrificing the interests of the group since, while he may be protected individually, he would still be exposed to hardship as a member of the group. Therefore, individual harm may be tolerated in order to avoid harming the group since harm cannot be relieved by inflicting its like.

Ibn Nujaim provides many examples of this in his book *al-Ashbah wal nazha'ir*. For example, he mentions the legality of firing at an enemy who has taken Muslims as human shields, of destroying a wall about to collapse into a main street, and of placing restrictions on people who are likely to abuse a position of responsibility. In the name of collective interests a debtor's property may be sold to recover his debts, prices may be officially set for foodstuffs to counter manipulation of the market by businessmen, and merchants may be forced to sell their goods at an official price. Cook-shops may even be banned from areas where drapers and textile shops are concentrated.If the harm caused by a thing is equal to the benefit derived from it, or if it is not clear which of them outweighs the other, then the rule is that avoiding harm is more important than securing some advantage or benefit.[16]

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gotten an excuse from me." So both went on till, when they came to the people of a town, they asked its people for food, and they refused to give them hospitality. And they found there a wall about to fall down, and he repaired it. (Moses) said, "If you had wished, you could have taken payment for it." He said, "This is the parting between you and me! I'll tell you the meaning of what you couldn't be patient with." As for the boat, it belonged to poor people working on the sea, and I wanted to disable it, for there was a king after them taking every (sound) boat by force." And as for the boy, his parents were believers, and We feared that he would be too hard on them in disobedience and disbelief." And We wanted their Lord to change him for them for one better in purity and nearer to mercy." And as for the wall, it belonged to two orphaned boys in the city. Under it was a treasure belonging to them. Their father had been righteous, and your Lord wanted them to reach their manhood and bring out their treasuas a mercy from their Lord. I didn't do it at my own command. That's the meaning of what you couldn't be patient with." *OJ*.

16. Ibn Nujaim, *al-Ashbâh wal-nazâ'ir*, 97, also 100, "If an interest and a disadvantage compete,

When interests conflict, the Sharia first attempts to reach a compromise. If this is not possible it assigns priorities. Here, the general takes precedence over the particular, the public welfare is more important than personal well-being, and avoiding harm is preferable to gaining an advantage. The final consideration is always to promote the public good.[17]

The Revision of Rulings

An awareness of the fundamental objectives of the Sharia leads scholars to revise previous judgements to keep pace with changes of time, place, and situation. This practice dates back to the time of the Prophet who tolerated behavior from some people that he would not tolerate from others. A report going back to Abu Hurayra tells of an Arab who once entered the Prophet's Mosque while the Prophet was there saying:

> "Lord forgive me and Muhammad, and don't forgive anyone else!" The Prophet laughed and said, "You certainly mention many of us in your prayers!" Then the man turned and went to the far end of the mosque, stood with his legs wide apart and started to pass water. When the other Arabs present realized what he was doing, they stood up and called out to him, insulting him. The Prophet did not move or say a word. Then, when the man had finished, he told him "This is the mosque and no one urinates here. It was built for the remem-

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more often than not avoidance of the disadvantage will be given precedence. The Sharia has put more emphasis on prohibitions than it has on obligations. The Prophet said, "Avoid what I have forbidden you, and do as much of what I have ordered you to do as you can" al-Bukâhrî, VI (96/2), 142. Thus it is allowed to fall short of an obligation if this is to avoid inflicting harm. Nevertheless, what is forbidden must remain forbidden, and we must treat these limits with respect, while specially avoiding major infractions, or *kabâ'ir*. This principle is illustrated by a ruling of al- Bazzazi (d. 827/1414) who said, "Whoever does not find the means to conceal himself should not wash after urinating or defecating, even if he is on the bank of a river, since doing somehting that is prohibited is more serious than failure to comply with an obligation..." . [See Muhammad b. Muhammad b. al-Bazzazi, *al-Jâmi'a al-wajiz*]

17. Avoidance of harm is part of the protection of interests. The Prophet said, "There is neither harm nor reciprocating harm in Islam." Based on this hadith scholars draw a general rule that whatever is harmful is prohibited. Ahmad, 1:313, this report goes back to Ibn Abbas. Ibn Taimîya discussed the conflict between benefit and harm in *Majmu'a al-fatâwa*, XX (Riyadh, n.d.), 48-61. Readers will also find a summary of this in Qaradawi, *Awlâwiyât al-haraka al-islâmîya*, (Cairo: Dâr al-Wahbah, n.d.), 202-6.

brance of God and for prayer." Then he had someone pour a bucket of water on the spot to clean it.[18]

Omar's decision not to distribute the newly acquired lands in Sawad was based on his understanding of the aims of the Sharia. He did not feel obliged to do what the Prophet had done, simply because the situation was similar. By the same token, the scholars have repeatedly revised the rules for giving alms due at the end of Ramadan.

Zakat al-Fitr

There is a special tax levied on all Muslims, normally at the end of the month of Ramadan, called *zakat al-fitr*. In the days of the Prophet, this was collected and distributed between the dawn prayer on the first day of Shawal, the month following Ramadan, and the festival prayer on the same morning. In a small community like that of Madinah, the poor were known by name and it was easy to distribute alms to them personally. Later, in the days of the "rightly-guided Caliphs," this special tax was distributed one or two days before the festival because the community had grown larger. Later still, some scholars ruled that this tax could be distributed in the middle of the month of Ramadan. They also said that the staple food of the people could be given, even though this was not mentioned in the Sharia. Omar ibn Abdul Aziz, Abu Hanifa (d. 150/767), and others, later ruled that the value of food could be given in cash. Their argument was that the Prophet said the poor should not have to ask for what they need on the day of the festival. This may be assured by giving cash as much as by giving food. Cash could even be more useful.[19]

When people do not understand the reasons behind the Sharia's rulings they may mistakenly contradict either the letter or the spirit of the law. It is not always easy to see the relationship between the

18. Ibn Mâja, I, 87.

19. In big cities giving charity as cereals, wheat and barley for instance, may cause hardship to both contributors and recipients, and so contradict the objectives of the Sharia. Poor people may not want to eat cereals on a holiday and try to sell these to get money to buy what they need. A glut of several commodities on the market would suppress prices and people would earn little by selling them. Their needs would be denied, and contributors would be embarrassed to see their gifts for sale in the market. This is discussed in more detail in Qaradawi, *Fiqh al-zakât*, II (Beirut: Mu'assasah al-Risâlah, 1981), 915-60.

Sharia's principles and the public interest. A ruling may even seem to contradict interests in some way and lead people to conclude that the Sharia should either be ignored or changed. To illustrate this point we will look at three common questions: inheritance rights, eating with the right hand, and shaving.

Inheritance

Orientalists and Muslim reformers have both criticized the Islamic system of inheritance. According to the Sharia, male relatives on the father's side such as brothers and paternal cousins have a larger share of a man's estate than do wives or daughters. This system reflects the needs of a society based on the extended family. The Islamic system of inheritance takes into account the responsibilities that men bear and their role in insuring public welfare through the extended family. The Qur'an defines other responsibilities toward relatives on the father's side which are also related to inheritance rights. For example, men are responsible for the financial support and guardianship of the orphan children of brothers or cousins, they bear criminal responsibility for paternal kin: if a man's cousin kills someone he must help him pay compensation to the victim's family. Clearly, social responsibility and the right of inheritance are complementary. It would not be fair to deny men their rights to inheritance while still expecting them to bear these responsibilities.

Eating with the Right Hand

Muslims eat and drink using the right hand. The Prophet said, "No one of you shall eat or drink with his left hand, for the devil eats and drinks with its left hand."[20] In another hadith he said, "Invoke God's name and eat with your right hand."[21] Once the Prophet told a man to eat with his right hand. The man told him, "I am unable to do that." The Prophet replied, "Then, may you be unable (to eat with your left hand)." Pride prevented him from eating with his right hand and he could not raise his left one to his mouth.[22]

20. Muslim, III (36/13), 1548 (no. 105-2020).
21. al- Bukhârî, VI (69/3), 196; Muslim, III (36/13), 1599 (no. 108-2022).
22. Muslim, III (34/57), 1599 (no. 107-2021).

There are reasons for eating with the right hand. First, it is part of the common etiquette that gives the Muslim nation its distinctive character and contributes to its practical unity. All nations recognize standards of courtesy and etiquette. Politeness and good manners demand that we eat with the right hand. Secondly, it compliments other rules of etiquette. While the right hand is reserved for eating, drinking, shaking hands, and so on, the left hand is used for dirty things, like cleaning oneself after using the toilet. Finally, the Prophet was careful to teach us to do this and we are required to follow his instructions.[23] Eating with the right hand is a matter of religion and not of personal habit.

Wearing a Beard

Wearing a beard is one of the symbols of Islam and a way Muslims recognize one another, even though the contents of their hearts may differ. Several hadiths say Muslims should distinguish themselves physically from non-Muslims. Growing the beard is part of the Sunna, not a custom or habit, and shaving it is a reprehensible act. The Prophet said growing a beard is part of being a man, and according to the Sharia masculinity, the natural state of manhood, should not be violated needlessly. Masculinity also distinguishes men from women, and women, similarly, must respect their femininity. For the same reason the Prophet prohibited men from wearing women's clothes, and women from wearing men's clothes.

As we pointed out at the beginning of this chapter, the Sharia is logical and reasonable and never arbitrary. Those who criticize it usually do not see it as an integral system of law. To appreciate the Sharia completely, we must understand its aims and the methods it uses to achieve them.

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23. For a discussion of the importance of etiquette in Islam, see Muhammad Asad, *Islam at the Crossroads*, (Karachi, 1975).

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THE FLEXIBILITY OF THE SHARIA

The Sharia is applicable to every place in every age: its remarkable adaptability continues to ensure its universal and timeless relevance. Critics of the Sharia often claim that it is strict, rigid, and incapable of coping with new issues and developments. They imagine that Muslims must submit to it blindly since it is founded in revelation, and since religious books constitute its fundamental sources. They support such criticisms with the Qur'an itself and quote verses such as:

> The words of believers when they are called to God and His Messenger for him to judge between them are, 'We hear and we obey.' And those are the successful (24:51).

> And it is not for believing men or women, when God and His Messenger have decided an affair, to have any choice in their affair (33:36).

Some critics go further and also question the Sharia's status as law. Their premise is that a religious code cannot also be a legal system. These positions, as we shall see, are untenable and ultimately rest upon misinformed arguments, cultural prejudice, and a heritage of fear and distrust.

For Muslims, it is inconceivable that God, the All-Knowing, the Wise, the Beneficent, and the Merciful, would reveal to the last of His Prophets an eternal code of law that would make their religion a burden, worsen their conditions of life, or fail to meet their ever-changing needs. Its Revealer has described it as perfect and designed it to be a blessing and a source of comfort for human beings. He has by no means made it a source of difficulty or discomfort.

The Sharia has always served the Islamic world well, despite differences of nation, culture, and era. Since the time of the Companions it has never been hamstrung or unable to cope with the demands of a changing community. For thirteen centuries it was the only system of law in use among Muslims. Then, under the weight of colonial expansion, Western legal systems were enacted to replace it. These new laws allowed what God had prohibited and abolished what God had ordained.

The Sharia has met the needs of every community it has governed. Since it is the embodiment of wisdom and justice it is well-equipped to solve all problems facing it. While it is true that the Sharia is a religious law, it has never held back the progress of Islamic civilization. On the contrary, it has always been a source of guidance, a milestone on the road to betterment, and a deterrent to corruption and tyranny.

The Sharia is rooted in reason, nature, and reality. It achieves a harmony between rights and duties, between substance and spirit, and between this world and the hereafter. Furthermore, it establishes justice between all people and guarantees the interests and welfare of all. Yet, beyond all of this, God gave the Sharia a remarkable flexibility so that it can be applied to every situation, confront any novelty, and still never struggle for a solution. Why this is, and how it is, forms the basis of the following discussion.

ONE: THE PRINCIPLE OF PARDON

One of the first things that the student of Sharia discovers is that law books deliberately leave an extensive margin of error in which jurists are free to apply their own discretion in pursuit of the welfare of society. Because of this they are able to shape the law according to what they consider to be best and most suitable within the context of their own time and situation. In this, they are guided by their understanding of the objectives and spirit of the Sharia, by legal precedent, and by tradition. This margin of error was deliberately left by the Lawgiver. The Prophet said,

> God the Almighty has laid down religious duties so do not neglect them; He has set boundaries so do not overstep them; He has prohibited some things so do not violate them: about some things He was

silent—out of compassion for you, not forgetfulness, so seek not after them.[1]

The Prophet believed that excessive questioning might eventually lead to more obligations, more duties, and more prohibitions. In another hadith he said,

> Leave me as I leave you, for the people who came before you were ruined by their questioning and their difference over their prophets. If I forbid you to do something, then keep away from it. And if I order you to do something, then do as much of it as you can.[2]

The Qur'an tells us,

> You who believe, do not ask about things which, if they were made known to you, would trouble you. And if you ask about them when the Qur'an is being sent down, they will be made known to you. God left them out, for God is Tolerant, Merciful (5:101).

The Prophet also said, "What God allowed in His Book is permissible, what He prohibited is forbidden, and what He was silent about is forgiven. So accept from God His forgiveness as He does not forget anything," and then he recited the verse, "and your Lord never has been forgetful."[3]

The easing of religious obligations and the creation of a margin of error were not accidental. God built them into the Sharia since He has made it valid for all places, all times, and all situations.

Matters not mentioned in the Qur'an or Sunna

After the death of the Prophet, responsibility for new legislation fell to a group of scholars who were qualified to perform ijtihad. They were responsible for deciding about things that were not mentioned either in the Qur'an or the Sunna. Their rulings reflect a range of opinions, and so offer guidance about matters that would not otherwise be clear to us. Any view that supports the context at hand and

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1. al-Dâraqutnî, *Sunan* IV, (Beirut: ᶜAlim al-Kutub, 1982), 298 (no. 104); *al-Nawawi's Forty Hadith*, tr. Denys Johnson-Davies, (Damascus: 1976), no. 30.

2. al-Bukhârî, VIII, (96/2), 139.

3. al-Hâkim, *al-Mustadrak*, II, 375.

results from the correct use of a recognized method of jurisprudence is acceptable. Among these methods are analogy, *qiyâs*, juristic preference, *istihsân*, and consideration of public interest, *istislâh*.

Analogy

Analogy plays a crucial role in Islamic jurisprudence. By analogy we mean to consider the status of something that is mentioned in the Qur'an and Sunna, and on the basis of a common unifying cause, apply this to something that is not mentioned in either of these sources. Comparisons using analogies should show no significant differences. Jurists know this as *qiyâs*.

For example, when Omar ibn al-Khattab was told that some people owned horses that cost as much as hundreds of sheep he asked, "Do we collect the zakat for every forty sheep, yet collect nothing for horses?" He quickly ordered the collection of zakat for horses, based on an analogy with sheep. This same type of analogical reasoning was later adopted by Abu Hanifa. Using this method, some scholars ruled in favor of payment of the special contribution due at the end of Ramadan, known as *zakât al-fitr*, in the local staple food. They based this position on an analogy with the foods mentiomed in the hadith: dates, raisins, barley, and cheese. It was also by analogy that the penalty mentioned in the Qur'an for slandering married women[4] was also applied to married men, and the phrase "believing women" was deemed to include Christian and Jewish women when it appears in the verse, "You who believe, if you wed believing women and divorce them before you have touched them, then there is no period for you to count. But give them a gift and release them handsomely"(33:49). Similarly, analogy leads us to conclude that the references to trading in "You who believe, when the prayer is called on Friday, hurry to remember God and quit your trading" (62:9), and "Do not urge anyone to return what he has already bought from another vendor so as to sell him your own goods,"[5] also include leases.

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4. Qur'an 24:4, "And those who accuse chaste women but do not bring four witnesses, lash them with eighty lashes... "

5. al-Bukhârî, III, (34/58), 24.

Analogy also supports the prohibition of using gold and silver utensils for storing water, lotions, oils and kohl, since eating and drinking from them had been clearly prohibited by the hadith, "Do not drink from gold and silver cups nor eat from gold or silver plates."[6]

Imam Isma'il b. Yahya al-Muzni (d. 264/878), a companion of Imam al-Shafi'i, said that "Jurists from the Prophet's time to our day have been using analogy . . . they have always agreed that the equivalent of correctness is correctness, and the equivalent of error is error. Nobody should reject analogy, for it amounts to drawing comparisons between like things."[7] All four Imams,[8] and most other scholars, have used it. Much has been written on its nature, principles, conditions, and scope. Sections on it can be found in most law books whatever the views and approaches they take on other matters of jurisprudence.

Juristic Preference

The excessive use of analogy sometimes leads to results that are unacceptable to the Sharia's objectives or that conflict with its principles of moderation and ease. When this happens jurists employ a method called juristic preference, or *istihsân*. There are several types of juristic preference. One is to give precedence to a particular interest over a general ruling arrived at by analogy. Another is to prefer an obscure but significant analogy over a more obvious but insignificant one. A third form of juristic preference is to restrict or selectively suspend a general rule in the light of extenuating circumstances; this is only used in cases where the maintenance of order and the upholding of justice depend upon a special execption of this kind.

Imam al-Shatibi said, "Juristic preference means to apply the stronger of two available proofs. If a general ruling becomes burdensome, or an analogy becomes rigid, then the general rule should be

6. al-Bukhârî, VI, (70/29), 207.

7. Ibn al-Qaiyim, *I'lâm al-muwâqqi'în*, I, 205.

8. The "Four Imams" are the founding Imams of the four Sunni "schools" of jurisprudence, Imam Abu Hanifa, Imam Malik, Imam al-Shafi'i, and Imam Ahmad b. Hanbal. *OJ.*

made specific (that is to say restricted) by any available means. Alternately, exceptions to the analogy should be found."[9]

There are many definitions of juristic preference. Imam al-Shawkani (d. 1250/1832) admits that there is a difference of opinion about what juristic preference is:

> Some say it is a matter of the intuitive knowledge of a consummate scholar that is difficult to express in words. Others say it is a matter of preference for a stronger analogy over a weaker one. Yet others say it is a matter of preference of custom to an established legal precedent or principle, in the pursuit of the public interest. It is said to be the restriction of an analogy by one that is stronger than it. Some maintain that it is to give precedence to a specific interest at the expense of a general principle arrived at by analogy.[10]

Legal evidence is required before any scholar may pass a ruling that is based on anything but the most obvious of analogies. Evidence is always required to support the selective restriction of a general rule. This is why juristic preference has been classified according to the legal evidence used to support it.

Custom provides one such type of evidence. For example, contracts for manufacture, *istisna'*, have no formal basis in Sharia law, nevertheless, the use of such contracts is customary and so they are legally valid. The same applies to the dedication of movable items such as books to an endowment in perpetuity, *waqf*. Necessity provides us with another type of evidence, and so a light splashing of urine does not negate ritual purity and well-water may be considered ritually pure. Interest gives us a third kind of evidence, and so, for example, an employee may be held responsible for property lost in his care. The need to avoid difficulty provides our last type of evidence, thus we may overlook technical "fraud" of a trivial nature in commercial transactions.

To illustrate the idea of juristic preference, let us look at an example from jurisprudence known as *The Case of the Donkey*. A woman died and left an assortment of heirs: her husband, her mother, her half-

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9. al-Shâtibî, *al-Muwâfaqât*, IV, 209.

10. al-Shawkânî, *Irshâd al-fuhûl ila tahqîq al-haqq min ʿilm al-usûl*, (Dâr al-Saʿâda, n.d.), 223.

brothers on her mother's side, and her full brothers. According to analogy, her husband is entitled to inherit half of her estate, her mother receives one sixth, her brothers on the mother's side share a third between them, and her full brothers receive nothing. This is because full brothers are relatives through the male line and are only entitled to what is left after the primary beneficiaries have had their legal share. Here, there was nothing left for them.[11]

Omar ibn al-Khattab's ruling was that the full brothers of the deceased had no entitlement. They objected, saying, "O Commander of the Faithful! What if our father was a donkey, don't we still have the same mother?" Omar considered their question and reversed his decision giving them a share in their mother's estate. Some Companions were later heard to say that even if their father was a donkey, it would not have made any difference. Because of this it was called the case of the donkey.

Ali, Ibn Mas'ud, and Ibn Abbas, believed that in such a case the full brothers would have no share, while Omar, Othman, and Zaid ibn Thabit agreed that they should participate in the half brother's share.[12] Ali's opinion was based on analogy while Omar's was based on juristic preference. Thus, in his concern for fairness and justice, Omar ibn al-Khattab was the first to use juristic preference.[13]

Another example of juristic preference is permission to undress for medical treatment. This is an exemption to the general rule that some parts of the body are pudendal and should not be seen by others. An exemption from this rule is necessary to prevent harm. Similarly, a small margin of error in weighing large items is legal.[14] Juristic preference provides the basis for allowing people of bad-character to testify in court if there are no people of good character able to do so. It also provides support for the common practice of using public baths without first agreeing on how much to pay, how long to stay, and how

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11. The husband gets 1/2 (3/6), the mother 1/6 and the half-brothers on the mother's side 1/3 (2/6); that is, 3/6 + 1/6 + 2/6 = 6/6, or 100 per cent, this exhausts the entire estate. *OJ.*

12. Ibn Qudâma, *al-Mughni*, VII (Beirut: Dâr al-Kitab al-ʿArabi, 1983), 21-23.

13. Muhammad Abû Zahra, *Mâlik*, (Dâr al-Saʿâda, n.d.), 378.

14. Here Dr. al-Qaradawi refers to *ribâ al-fadl*, a kind of interest that is received immediately, usually in bartering. This is normally proscribed. *OJ.*

much water to use. Technically, such details must be specified in contracts for sales and services. Imam Malik said that a person could agree to work for board alone if this lessens his hardship, even though it would be difficult to estimate how much food he would eat.[15]

Consideration of Public Interest

Consideration of public interest, *istislâh*, plays an important role in jurisprudence.[16] According to Abdul Wahhab Khallaf, this is the most effective method of handling non-textual issues. By referring to the public interest, the Sharia can cope with changing demands made upon it.[17] In Islamic jurisprudence, the term *istislâh* means to consider the absolute public interest[18] as valid evidence to support a position about something not covered by any primary source.[19] In every instance of legislation, the Sharia seeks to preserve the public interest.

Most scholars believe that public interest can provide valid legal evidence upon which legislation, legal rulings, or judgments may be based. Law books contain hundreds of examples of this. These examples describe precedents established either by reference to the absolute public interest, or by the need to avoid harm.

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15. al-Shâtibî, *al-Iʿtisâm*, II (Cairo: al-Iʿlânât al-Sharqîya, n.d.), 143.

16. *Istislâh*, the consideration of public interest, is regarded as a basis of law in the Sharia. The jurists of different schools have used different Arabic terms to describe it. The Hanafis call it *istihsân*, meaning equitable preference to find a just solution. Imam Malik calls it *al-masâlih al-mursala* (sing. *al-maslaha al-mursala*), meaning public benefit or public welfare. The Arabic word *mursal* literally means "set loose [from the texts]" and *maslih* means welfare. Imam Ahmad b. Hanbal calls it *istislâh*, that is to seek the best solution with respect to the general interest. The Hanbali scholar Ibn Qudama as well as the Maliki jurist Ibn Rushd have occasionally used the term *istihsân*. The Shafi'is are the only group of scholars who do not recognize *istihsân* as a source of law. According to Imam al-Shafi'i, *istihsân* threatens to open the door to the unrestricted use of fallible human opinions, since the public interest will vary from place to place and time to time. See Abdur Rahman I. Doi, *Sharia: The Islamic Law*, (London: Ta Ha, 1984), 81-83.

17. Abdul Wahhâb Khallâf, *Masâdir al-tashrîʿ* al-islâmî fimâ la nas fîhi, (Kuwait: Dâr al-Qalam, n.d.) 85.

18. *al-Maslahat al-mursala*: the terminology of the jurists is not uniform, see note 16 above. Malaki scholars prefer to use the term *al-maslahat al-mursala* (literally, public benefit or welfare) where Shafi'is and Hanbalis say *istislâh*. This difference of usage is indicated in the text where *al-maslahat al-mursala* is translated as "absolute public interest," and *istislâh* appears as "public interest." There is no significant difference in these two terms which merely reflect differences of usage among scholars. *OJ*.

19. al-Qarâfî, *Kitâb al-furuq*, II (Beirut: Dâr al-Maʿârif, n.d.), 107.

The Companions of the Prophet understood the Sharia better than anyone else. They made extensive use of the principles of public interest and based many decisions upon it. For example, it was the public interest that made Abu Bakr compile a complete written text of the Qur'an, although this had not been done by the Prophet. While Abu Bakr hesitated at first, he went ahead after Omar ibn al-Khattab encouraged him, realizing that this was for the public good and general interest of Islam. Public interest also guided him to appoint Omar ibn al-Khattab to succeed him, though the Prophet had not appointed any successor. When Omar became Caliph, public interest led him to levy a land-tax, *kharâj*, set up an administrative apparatus, incorporate cities, build prisons, and enact a series of discretionary penalties. For example, he destroyed adulterated milk and bound over half the property of local governors who worked in trade and commerce while they were in office.

In the light of public interest, the third Caliph, Othman, established a standard copy of the Qur'an and sent examples of it to all the provinces. Then he burned all records that deviated from it. When a dying man divorced his wife only to deprive her of her inheritance, Othman passed a ruling to guarantee her rights. This, too, was based upon public interest. Public interest motivated Ali to ask Abdul Aswad al-Du'ali (1 before Hijra - 69) to formulate the principles of Arabic grammar. On the same basis, Ali held artisans liable for property they lost while in their care if they could offer no evidence that normal precautions had been taken to safeguard it. He said, "Nothing serves the people better than this."[20] Muadh ibn Jabal used to support his decision to collect textiles in payment of zakat saying, "Bring me *khamis* and *labis*, I will take them instead of wheat and barley. This is easier for you and more useful to the poor in Madina." Mu'awiya used public interest as a basis for his decision to accept two quarts of wheat instead of a gallon of dates for *zakât al-fitr*.[21]

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20. Abdul Wahhâb Khallâf, *Masâdir al-tashrîʿ* al-islâmî fîmâ la nas fîhi, 85-88.

21. al-Qaradâwî, *Fiqh al-zakât*, II, 803, 932; The unit of measure mentioned in the sources is a *mudd*. Edward Lane says in his *Lexicon* that the "*mudd* of the Prophet was one fourth of one *saa*, this was five pints and one third." Lane, *An Arabic English Lexicon*, VII (New Delhi: 1985), 2697. *OJ*.

Public interest led the Umayyad Caliphate to set up postal services, make Arabic the language of administration, mint money, and make other decisions regarding public administration and services. No jurists ever opposed them over these initiatives. In the interests of defense, many Maliki jurists passed judgments in favor of levying taxes on those who could pay them whenever treasury funds were insufficient to support the army.[22] It was public interest that made most jurists allow the killing of a Muslim used by disbelievers as a human shield, so long as fighting was necessary.[23]

Finally, while the sanctity of the dead is legally protected, many jurists allow opening the womb of a dead woman to rescue her unborn baby if it is thought to be alive.[24] In fact, some jurists say this is obligatory since it may rescue a human soul but inflicts damage on only a part of the corpse. According to al-Nawawi (d. 676/1278), this case is similar to survival cannibalism, where a dead body may be eaten to avoid starvation.[25] Here again, the interests of the living are given precedence over the interests of the dead. The aim is to balance interest and harm.

Public Interest in the View of Jurists

Some jurists refused to accept consideration of public interest as an independent source of legal judgments and legislation equal to textual evidence, consensus, and analogy. Imam al-Ghazali (d. 505/1111), for example, thought consideration of public interests was fanciful. Nevertheless, he mentions several cases in which he leaned towards it by linking it to a primary source of evidence:

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22. ibid. 986-7.

23. al-Ghazâlî, *al-Mustasfâ*, I, 294-5.

24. Hanafi and Shafi'i, most Maliki, and some Hanbali jurists permit this. According to the Hanbalis it is not permitted to damage the corpse of a pregnant woman since this is certain to violate the sanctity of the dead and it is likely that her unborn child will be dead also. Imam Ahmad cites a hadith reported by Abu Da'ud which says, "To break the bone of a dead person is like breaking a bone of the living." The response to this is that the breaking of the bones of a corpse in not by any means necessary and can not be in the interests of anyone. Some Hanbali jurists, nevertheless, permit the opening of a dead woman's womb if there is some movement of the fetus within her, since this is evidence of life. In this case, one does not say "maybe it will be alive." Rather one hopes that it can still be saved.

25. al-Nawawî, *al-Majmuᶜa*: sharh al-muhadhab, V (Beirut: Dâr al-Fikr, n.d.), 301-2.

> Whoever thinks that consideration of public interest, *istislâh*, is evidence in its own right is mistaken. Rather we consider such interests to be associated with the Sharia's objectives, which are known from the Qur'an, the Sunna, and universal consensus. Any interest that is not directly concerned with the preservation of one of the Sharia's objectives—which we understand from the Qur'an, the Sunna, and universal consensus—is outside the realm of interests that could have any use as evidence. Whoever uses consideration of public interest as evidence has determined an aspect of the Sharia just as much as someone who uses juristic preference does. Any interest that goes back to the preservation of one of the Sharia's objectives—known to be so from the Qur'an, the Sunna, and universal consensus—cannot be considered to be independent of these objectives. [A decision] based upon this cannot be said to be based on an analogy, *qiyâs*, rather it is based on an absolute public interest since analogy is a specific source of law. As for absolute public interest, *al-maslaha al-mursila*, this is attested to by more than a single source of evidence. Indeed, it rests upon many different sources, so many that they would be difficult to enumerate. These come from the Qur'an and the Sunna, from comparisons of like things, and from precedent... If we interpret interest in terms of preservation of the Sharia's objectives then there is no dispute about it: interests definitely constitute evidence.[26]

It is commonly believed that the use of public interest is peculiar to the Maliki school. However, al-Qarafi (d. 684/1285), a Maliki scholar, said,

> If you examine how the various schools use analogy, [that is] how they compare and contrast [cases], you will find that they are not in fact attempting to draw evidence from a particular comparison or contrast. They are instead considering the unique context of a situation. This is consideration of the absolute public interest and it is common to all schools.[27]

If you read the books of the other schools you will find that hundreds of issues are handled in terms of interest. Although it is true that

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26. al-Ghazâlî, *al-Mustasfâ*, I, 310-311.

27. al-Qarâfî, *Sharh tanqîh al-fusûl*, (Cairo: Maktabat al-Kúliyât al-Azhariya, 1967), 171.

this is more common among the Hanafis and the Hanbalis than it is among the Shafi'is.

Al-Qarafi mentions several cases in which al-Juwaini (d. 478/1085), known as Imam al-Haramain, records rulings in his book, called *al-Ghyath al-imâm*, based on absolute interest, *al-maslahat al-mutlaqa*, and in which he allowed things that not even the Malikis permit.[28] Imam al-Ghazali does the same thing in his book *Shifâ' al-ghalîl*.[29] Both men were Shafi'i scholars and were critical of the Maliki's use of absolute public interest. Imam al-Ghazali established strict rules for its use, laying down conditions that are difficult to meet. He says that the question must refer to one essential interest from the five discussed above.[30] If it refers to a secondary interest, then the absolute public interest may not be considered. In his view, the absolute public interest must refer to something that affects all people. It cannot refer to an individual circumstance, or those of a particular group within a society.[31] Al-Qurtubi (d. 671/1273) said that if it met such conditions, the use of absolute public interest could never be challenged. Ibn al-Munaiyier (d. 683/1284) dismisses al-Qurtubi's conditions as a clever way to support his opinion that no one should ever use absolute public interest as evidence to support a ruling.[32]

The Companions of the Prophet do not seem to have imposed such conditions on the consideration of public interests, *istislâh*, when mak-

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28. al-Juwaînî, *Ghyath al-imam fî tiyath al-zulm*, (Alexandria: Dâr al-Daᶜwa, 1978).

29. al-Ghazâlî, *Shifâ' al-ghalîl bayn al-ashbâh wal-mukhîl wa-masâlik al-ta'lîl*, (Baghdad: al-Irshâd, 1971).

30. al-Ghazâlî, *al-Mustasfâ*, I, 286-7: "As for interest, this essentially refers to the realization of some benefit or the avoidance of some disadvantage. Yet this is not what we mean when we say interest. Indeed, what we intend when we say interest is the preservation of the aims of the Sharia. These can be divided into five categories. The preservation of ones religion, self, mind, progeny and property. Anything that can be related to the preservation of [one of] these five fundamental imperatives is considered an interest. Anything that threatens one of them is detrimental [to the Sharia]. To counteract such threats is also an interest. These five fundamental imperatives are considered to be essential [to the maintenance of the Sharia], they therefore constitute the highest order of interests."

31. Nonessential interests can be divided into two classes: those that aim to relieve hardship, *hâjîya*; and those that aim to improve existing conditions, *tahsînîya*. For a complete discussion of this topic, see Chapter 2 above. *OJ*.

32. al-Shawkânî, *Irshâd al-fuhûl*, 226; ᶜAlî b. Muhammad b. Mansûr, known as Ibn al-Munaiyîr, was Qadî of Alexandira. *OJ*.

ing legal rulings. Omar, for instance, ruled that a woman whose husband had disappeared should wait four years from the date of her petition before being given a divorce, since her husband's death was not certain. Omar's ruling is based on a secondary interest and aims to relieve hardship. It also rests upon an uncertainty: a presumption of death. Omar's view was supported by Othman, Ali, Ibn Omar, Ibn Abbas, and some later scholars.[33]

In a different kind of case, al-Dahhak ibn Qays wanted to construct an irrigation ditch across his neighbor's land, but his neighbor, Mohammed ibn Maslama al-Ansari, refused to allow him to do this. Al-Dahhak told Muhammad, "Will you really prevent me from doing this, even though it will benefit you as well? You will get water from it, and it will do you no harm." Unable to agree, they took the matter to Omar ibn al-Khattab. He asked Muhammad, "Will you prevent your brother from something that will benefit him and be of no harm to you?" Muhammad continued to deny al-Dahhak access to his land. Omar said, "This thing will cross your land whether you like it or not!" Then he ordered al-Dahhak to go ahead and build his irrigation ditch across Muhammad's land, which he did.[34] The history of the Companions and the Rightly Guided Caliphs provides many examples of this type of ruling.

Al-Shatibi does not lay down the same strict conditions as al-Ghazali for the consideration of absolute public interest, but he mentions three conditions of his own.

> An interest should be reasonable in itself and have nothing to do with matters of worship. It should also fit with the general objectives of the Sharia; by this I mean that it should not conflict with any of its basic principles but should be in harmony with its primary aims and objectives to the extent that it is one with them or very close to them. Neither should an interest be bizarre or strange, nor should it rely on peculiar supporting evidence. It should be related to the preservation

33. Ibn Hazm mentions that in such a case a woman could be supported from public funds "like other poor people." He also describes how Ibn Omar suggested that her husband's money be set aside for her use. Omar ibn al-Khattab was presented with a number of cases of this type and decided that such women should wait four years before they re-marry. See Ibn Hazm, *al-Muhallâ*, X (Beirut: Lajnat Ihyâ' al-Turâth al-ᶜArabî, n.d.), 133-6. *OJ*.

34. Ibn Rushd, *Bidâyat al-mujtahad*, II (al-Mu'âhad, n.d.), 31.

> of an essential interest, or to the lifting of some difficulty related to the practice of religion. The preservation of essential interests is always a means to an end and not an end in itself. The lifting of difficulty may be related to an essential interest or it may be related to a secondary one that aims at either improvement or ease.[35]

Therefore, it is not the case, as al-Ghazali maintains, that only interests that insure something vital may be considered as evidence, for an interest that relieves a burden may also constitute evidence. Neither is it true that only general or communal interests may provide evidence since the welfare of individuals and of different social classes is something that is considered by the Sharia. Finally, it is not correct to assume that interests must be definitive and unambiguous before they may be taken as evidence since a reasonable supposition provides ample grounds for the pronouncement of subsidiary rulings. There are many examples of this in books of jurisprudence.

The most important thing to consider, however, is that an interest should be real, not merely imagined. Human whims and desires, supposition and poor understanding, custom and tradition, have always moved people to act in their own best interests or in those of others. Often, however, they are really acting against the very interests they sought to protect. Such action is more damaging than helpful. More often than not, people overlook the public interest while trying to protect a private one. The cost of an immediate advantage is later hardship. A moral loss follows material gain. Major transgressions are committed in the pursuit of some triviality. This is because human beings are strongly influenced by personal and material considerations, by their desire for instant gratification, and by circumstances that affect their ability to think objectively. It is necessary to be cautious and impartial when examining and evaluating interests.[36]

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35. See al-Shâtibî, *al-ʿItisâm*, II, 129-35; and Abdul Wahâb Khallâf, ʿIlm usûl al-fiqh, (Kuwait: Dâr al-Kuwaitîya, nd.), 84-8 and Muhammad Abu Zahra, *Mâlik*, 391, 431.

36. Imam al-Gâzâlî has been criticized for concentrating on one level of interests, that is, interests that ensure something vital, *darûriya*, while neglecting other categories such as those that relieve a burden, *hâjîya*, and those that improve a situation, *tahsînîya*. To define interests in terms of preservation of the objectives of the Sharia is correct, but to confine these objectives to the mere preservation of essentials is not obviously justified.

Imam Ibn Daqiq al-Id (d. 702/1302) said, "I do not oppose whoever takes interest as evidence. However, its identification and regular use requires careful consideration."[37] We should perhaps point out here that rulings based on a specific interest will only remain valid while this interest remains. If the interest supporting a ruling changes or ceases to exist, the ruling must change accordingly, since its validity is dependent upon the conditions, or interests, giving rise to it.

To illustrate this point, let us look at the discretionary punishments and rulings established by the "Rightly Guided" Caliphs, the Companions of the Prophet, and others in response to social conditions of their times. The Prophet himself provides examples of this. He initially prohibited the recording of hadiths, fearing that people would confuse them with the revelation of the Qur'an. Omar ordered the Companions not to talk too much about the Prophet, since this tended to distract them from the Qur'an. This was a decision he took in the light of the particular circumstances of his times. Omar also encouraged people to perform the Greater Pilgrimage without observing the rites of the Lesser Pilgrimage on the same journey.[38] He was afraid that people would neglect Makkah at other times of the year.

According to Ibn al-Qaiyim such cases represent "a specific policy developed in response to changing interests in changing times."[39] It is the subjective nature of local conditions, and peculiarities of time and place, that cause rulings to change. We will discuss this subject in detail a little later.

CUSTOM

Custom is an area where primary legal sources are silent. It is also a rich source of legislation. We mean by custom the things that people are used to, familiar with, and practice with ease and reassurance in their daily lives. Customs can be verbal or active, general or local.

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37. Muhammad b. ᶜAli b. Wahb, known as Ibn Daqîq al-ᶜId, see al-Shawkânî, *Irshâd al-fuhûl*, 226.

38. This kind of pilgrimage is called *hajj ifrâd*; here one only performs the rites of hajj and does not perform the rites of umra, or minor pilgrimage, in the same Pilgrimage season. *OJ.*

39. Ibn al-Qaiyim, *al-Turuq al-hukumîya fî al-siyâsat al-sharᶜîya*, I, (Matbaᶜ al-Sunna al-Muhammadîya, n.d.), 16-8.

For example, verbal custom establishes that fish cannot be called meat; and while the word *walad* in classical Arabic refers to both male and female children, in popular usage it means male children only. Active customs include the practice of selling goods at fixed prices.[40] General customs are what everyone regards as normal standards of social behavior despite differences of social class. Local customs are things that are familiar and commonplace in some countries or within some social groups, but unfamiliar in others, such as commercial customs among businessmen and agricultural practices among farmers.

When Islam first came, the Arabs were living according to various traditional customs and practices. Islam sanctioned those that were compatible with its goals and principles, modified the ones that were partially acceptable to it, and prohibited those that conflicted with it.

There are many things that the Sharia did not regulate directly but left to custom. The amount of money to be spent on women's maintenance is determined by custom since the Qur'an says only, "The duty of feeding and clothing nursing mothers in a fit manner belongs to the father of the child" (2:233). The same is true of indemnity for divorced women, "For divorced women, support out of kindness is a duty for those who fear God" (2:241).[41]

Custom establishes the meaning of *tafarruq*, or parting, in the Prophet's saying, "A transaction is reversible if seller and buyer have not parted."[42] It determines the meaning of *ihyâ'*, or revival, in the hadith, "Whoever revives a dead land is its owner."[43] Custom establishes the meaning of or possession, *hirz*, in theft; the meaning of taking possession, *qabd*, in sales and gifts, just as it establishes many other usages.

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40. Normally prices and conditions of sale should be mutually agreed. *OJ.*

41. Compare: "There shall be for divorced women provision honorable — an obligation on the godfearing" (Arberry, 34); "For divorced women maintenance (should be provided) on a reasonable (scale). This is a duty on the righteous" (Yusuf Ali, 96); "Divorced women should have some provision [made] for them as a duty binding on the heedful" (Irving, 39).

42. al-Bukhârî, III, (34/19), 10.

43. al-Bukhârî, III, (41/15), 70; In Muhammad Khan's translation, "He who cultivates uncultivated land (belonging to nobody) will possess it. . . ." *OJ.*

The Sharia established rules but did not explain them in detail. According to Ibn Qudama (d. 630/1223) and other Hanbali jurists, this means that the details of these rules have been left to the customary practices of people.

Jurists base many of their rulings on custom, and sometimes defend this practice by quoting Ibn Mas'ud, who said "What the Muslims see as proper, is proper before God." Some people believe it was the Prophet who said this, but it is in fact Ibn Mas'ud's own comment.[44]

It is a well known rule of jurisprudence that custom has the force of law. This is reflected in several well known proverbs, "Custom comes from virtue while rules come from restrictions," "Custom is as strong as law," and "What custom prohibits is impossible."

Custom can be seen as a type of interest, since it is in the people's interest to sanction what they have been familiar with for generations. Their dependence on habits and customs means that these have become an important part of their social organization, and that people would have difficulty abandoning them.

Islam is based on the principles of removing difficulties and of making things easy. God reminds us of this more than once. "God wants you to have it easy—He does not want you to have it hard..." (2:185) and, "He has chosen you and has not set you any hardship in the faith..."(22:78). To the same effect, the Prophet said to his Companions, "You have been sent to make things easy, not to make things difficult."[45]

Customs may only be considered as evidence if they do not conflict with a confirmed text or universal consensus, and if they do not harm anyone or indirectly contribute to harm. Customs that conflict with primary sources, which allow what is prohibited or prohibit what is allowed, which introduce heresies or spread corruption and harm among people, are not admissible as legal evidence in any form.[46]

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44. This report has been traced to the Prophet on the authority of Anas but its *isnâd* is defective; see al-ʿIjlaunî, *Kashf al-khafâ' wa-muzîl al-'albâs*, II (Beirut: Mu'sassat al-Risâla, 1983), 245 (no. 2214).

45. Tirmîdhî, I, 99 (no. 147).

46. Abdul Wahhâb Khallâf, ʿIlm usûl al-fiqh, 91.

Finally, rulings that are based on custom will change with the change of custom, both in time and place.

Al-Shatibi mentions men's wearing of caps or hats as an example of a custom that varies from one country to another. He says,

> Attitudes toward men appearing in public bare-headed vary from place to place. In Eastern countries this is not compatible with notions of masculinity, while in the Western lands [of Islam] this is not so. The ruling varies accordingly: In the East, it is objectionable [for men to appear in public bare-headed] while in the West there is no objection to it.[47]

Al-Qurafi explains the need to change with the times and quotes Imam Malik who said, "If a couple argues about who will take possession of the marriage settlement after consummation of the marriage, the final word remains that of the man, though the rule is that the man should not take possession of the settlement." A Maliki jurist, Qadi Isma'il, explains that "This was according to [the] custom in Madina.... Today traditions have changed, and a man does not consummate his marriage until his wife has received her entire settlement. Therefore, the final word remains that of the woman who may dispose of her property as she pleases."[48]

Ibn Nujaim argues the case for local customs. Based on one such custom he says that in some Cairo markets, shop holders are given the right to sell the leases they hold on their shops. Resale of these leases should rest exclusively with the lessee. That is to say, the landlord may neither evict the tenant nor sell his lease to someone else, even if the lease is the property of a religious endowment.[49]

THE NATURE OF RULINGS DERIVED DIRECTLY FROM THE SOURCES

Normally, the Qur'an and Sunna deal only with the basic principles of law, or give only general rulings without going into details of how things should be done. Detailed instructions are given by the Qur'an

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47. al-Shâtibî, *al-Muwâfaqât*, II, 198.
48. Muhammad Abû Zahra, *Mâlik*, 452.
49. Ibn Nujaim, *al-Ashbâh wal-nazâ'ir*, 52.

only if a ruling is intended to be both universal and eternal. For example, we find detailed information in the Qur'an and Sunna dealing with the rituals of worship, regulations regarding marriage, divorce, inheritance, and other features of family law. Details about ritual practices must be given to avoid latter innovation, while details of family law ensure social stability by helping to avoid potential conflicts within the family unit.

In addition to this, there are many areas where the Sharia's position must vary according to time, place, and local custom. Here, the primary textual sources, the Qur'an and Sunna, are usually general and flexible. In this way the Sharia avoids the complications that arise when a minutely detailed system of law is imposed upon people. A finely tuned law may be relevant to one age but not another, it may be suitable for one community but not another, it may be appropriate to one situation but not another.

Consultation

When the Prophet was still in Makkah, the Qur'an established the principle of consultation, *shura*. This was given an importance similar to that of prayer. The Qur'an refers to the Muslims as those "whose business is (conducted) by consultation among themselves..." (42:38). Later, at Madinah, God commanded His Messenger to consult the believers "on business" (3:159).[50] Thus the obligation of the leader to seek the advice of others was established. But what does consultation mean? How should it be done, and what is the relationship between rulers and the ruled? The Qur'an and Sunna have laid down the ruler's obligation to seek advice, but did not give details about how this should be done. This is because every age has its own political culture, every situation has its own circumstances, and every community is unique. These factors affect the way consultation is carried out. Rural people are different from townspeople, the literate differ from the illiterate, and circumstances of peace differ from those of war. Therefore, a single, rigid form of consultation would be a source of hardship and difficulty. God's desire is to make things easy, not difficult.

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50. Compare: Abdullah Yusuf Ali, "in affairs of moment." *OJ*.

People should not be governed by a ruler they did not choose, who does not seek their advice, who rules arbitrarily, and who tolerates no criticism of his actions. In the biographies of the Prophet and of the Rightly Guided Caliphs who succeeded him, various types of consultation are mentioned. These differ according to the circumstances of the times and offer us a choice of the best method to use ourselves: references are made to public referendums of various types, and other forms of public consultation.

Perhaps the most important aspect to consider here is the Sharia's concern to describe the qualities of leadership, expressed in terms of the responsibility the leader bears with regard to the Qur'an and the Sunna. To mention a few qualifications of leadership described by jurists, the leader should be strong and trustworthy,[51] vigilant and knowledgeable.[52] The Sharia also places importance on the qualities of ordinary people who contribute to decision making by lending their voice and support to proposed policies.

When concluding transactions, God says we should "call to witness two witnesses from your men. And if there are not two men, then a man and two women you all approve of as witnesses" (2:282). If acceptability of the witness is a must in buying and selling, just imagine how much more important this is in politics. In case of the reversal of a divorce, God says, "Call two just men among you to witness, and keep your testimony upright before God" (65:2). If this is the case with the smaller community—the family—how can testimony of those not endowed with justice be accepted in the larger community—the nation? Similarly, the Qur'an and the Sunna command us to be just in government, and to govern by what God has revealed.[53]

Justice

How should we observe the command to be just? Should judgment be general or specific? Should it take place on one, or on more than

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51. Qur'an 28:26, "Best for you to hire is the strong, the trustworthy."

52. Qur'an 12:55, "He said, 'Put me over the storehouses of the land, for I am a skilled keeper.'"

53. Qur'an 4:58, "If you judge between people to judge justly" see also 5:44,45,47 and 49.

one level? Should a single judge sit before critical cases, or should he be joined by other judges? The Qur'an and Sunna give no details on these issues which have been left instead to the judgment of the Muslims, in the fullness of time.

The Qur'an lays a duty upon all Muslims to call others to what is right and to forbid what is wrong.

> Let there be among you a group who call for good, and order what is right and forbid what is wrong. It is those who are successful, (3:104).[54]

This is supported by much other evidence from the Qur'an and Sunna. These texts do not say how this is to be done. This has been left to the Muslims who should decide for themselves the best way to achieve the goals the Sharia has set for them. Some aspects of the law do not require public participation and are impossible for the authorities to enforce, and so it is up to the conscience of each person to abide by them accordingly. Other aspects of the law may be socially enforced by means of non-governmental societies and associations. Finally, a section of the law must be enforced by executive and judicial authority, or some other kind of government body such as the *muhtasab*, a type of police charged with the protection of public morals and about which much has been written.

The Qur'an does not give us a detailed set of rules. God has instead provided it for our guidance and to help us find a way out of difficulty. This is why the Qur'an emphasizes principles and objectives and rarely addresses means and methods. These are only described when clearly necessary. God intends to provoke the human mind to think and to exercise discretion. Every community, and every generation, may choose a path that is appropriate to it, within the context of the times and in response to the challenges facing it. This freedom has allowed Muslims to organize courts of law, set up new systems of government, and establish various types of police authorities. The Prophet did not assign anyone to the judiciary. He was the one who judged between litigants in his mosque and indeed, any place of his

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54. See also 9:71, "And believing men and women are friends of one another. They order the right and forbid the wrong, and they establish prayer and they pay the poor-tax ...."

choice. His governors and regional emirs, such as Ali ibn Abi Talib, Muadh ibn Jabal, and Abu Musa al-Ashari, were not only responsible for judicial affairs, but also had administrative responsibilities. In Abu Bakr's reign, Omar was in charge of the judiciary, but was rarely required to judge cases since people resorted to their faith and the Qur'an in order to settle disputes. When Omar became Caliph, he made his own appointments to the judiciary. These were men such as Abu Musa al-Ashari, Shuraih, and Kaab ibn Suwar. It was at this time that the judiciary became an independent administrative function and Omar wrote his famous rules on it.

In the times of the Abbasids, the office of the supreme judge came into being. The first chief justice was Abu Yusuf (d. 182/798), a companion of Abu Hanifa. In his reign, Abdul Malik ibn Marwan (r. 65-86/685-705) started to look into grievances and passed rulings by himself. He used to receive complaints from his subjects against some state officials—governors, leaders, and judges—and pass judgment himself.

During the short reign of Omar ibn Abdul Aziz (r. 98-101/717/720), it became more common to investigate complaints and civil courts were consequently set up. Municipal judges assumed functions that distinguished them from other judges since they combined, in the words of al-Mawardi, "the power of the state and the justice of the judge." These civil courts worked like a courts of appeals or administrative tribunals, or what is called in some countries a state councils. Often more than one judge sat on such courts, which some books call tribunals or boards.

Islamic history gives us many examples of judiciary systems. These were the product of historical development. Neither the Qur'an nor the Sunna describe them. The Muslims, in any given time, never hesitated to alter these arrangements. They did not think that changing these things was heresy or novelty in religion because practical organization has nothing to do with belief, worship, or ritual. There is no conflict between the Sharia and any modern judicial system that aims to realize justice among people and to preserve their confidence and peace of mind. For example, judges may specialize in an area such as civil or criminal law, and courts may be organized on a variety of levels: municipal, federal, appellate and so on. God did not commit us to a particular form of judicial system.

Our age has witnessed many developments in criminology and forensic science. Modern techniques of crime detection include the use of fingerprints, voice analysis, comparison of handwriting, and much more. Such developments help to achieve the Sharia's goals. Ibn al-Qaiyim said,

> God did not define a single path to justice, to the exclusion of all others. However, the Sharia makes it clear that His aim is to establish righteousness and justice among people. Any way that leads to righteousness and identifies justice should be considered. We do not pursue means for their own sake. It is the ends that are the true objective. God uses examples to teach us methods so that we may find others like them.[55]

The voluntary control system known as *hisba*, follows the principle of "ordering what is right and forbidding what is wrong." It started simply, and was later specialized and refined. At one point, it included many of the activities now covered by various ministries and government departments: public health, social affairs, national insurance, local government, and traffic police. It also included areas not normally subject to government control such as the observation of religious duties and prevention of cruelty to animals.

There are also many systems of government which Muslims developed to cope with the changing world. Ministries were first introduced in the Abbasid age and received the approval of scholars who later spoke of them as a usual feature of Islamic government. The Muslims experienced two kinds of ministries under a Caliph or Supreme Head of the State; the "Mandatory Ministry," which is similar to the government in the parliamentary system and the "Executive Ministry," which is similar to the government of a modern presidential system.

MULTIPLE INTERPRETATION OF TEXTS

Most evidence from the Qur'an and Sunna may be interpreted in more than one way. This explains the emergence of various schools and trends in Islamic jurisprudence. There were strict jurists such as Ibn

55. Ibn al-Qaiyim, *I'lâm al-muwâqi'în*, IV, 383.

Omar, and lenient ones such as Ibn Abbas. Abu Hanifa was able to make extensive use of analogy and Imam Ahmad could insist upon a literal interpretation of the Qur'an and Sunna. Some jurists depended on methods of jurisprudence in order to discover the Sharia, while others insisted on evidence from hadiths and accounts about the Prophet's companions, *athar*,[56] to support their rulings. To illustrate the wide range of possible interpretations we will quote two examples from the Qur'an and the Sunna, the oath of sexual abstinence, *ila'*, and the practice of price control.

The Oath of Sexual Abstinence

In the Age of Ignorance, if a woman refused her husband something he would sometimes swear an oath not to have sex with her for some time, leaveing her neither a widow nor a properly married woman. When Islam came, it restricted such abstinence to four months.

> As for those who swear to keep away from their wives, they must wait four months. Then, if they change their minds, God is Forgiving, Merciful. And if they decide upon divorce, then God hears, He knows ... (2:226-7).

This prohibits men from harming their wives by swearing to keep away from them for long, or indeterminate periods, and acknowledges the legal right of women to sexual intercourse with their husbands. This also gives women the opportunity to free themselves from men who would harm them by depriving them of sexual relations.

Since the time of the Companions jurists have interpreted these verses differently. For example, some of them believed that if a non-Muslim who is living in a state ruled by the Sharia made an oath like this it would be invalid unless preceded by divorce, since, they said, a non-Muslim's oath by God is invalid. Others disagreed and said that anyone's oath by God was valid, since God said, "As for those who swear to keep away from their wives," and did not restrict this, as al-Razi (d. 606/1209) points out, to Muslims alone.[57]

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56. Some scholars refer to reports of the words and actions of the Companions as *athar*, rather than hadith. *OJ*.

57. See Fakhr al-Dîn al-Râzî, *Tafsîr al-kabîr (mafâtih al-ghayb)*, VI (Beirut: Dâr al-Fikr, 1981), 87.

Anger

Many jurists believed that an oath of sexual abstinence was valid whether or not it resulted from a disagreement. Ali and Ibn Abbas, said that such oaths were valid only if made angrily in the course of bickering and dispute. Al-Suyuti (d. 911/1505), relates that when a man told Ali that he had sworn not to have sex with his wife for two years, Ali told him that this was *ila'*. The man replied that he had done this because his wife was breast-feeding and Ali said, "Then this is not *ila'*."[58]

Al-Suyuti also tells us that Ibn Hammad once asked Ibrahim al-Nakh'i about the validity of a man's oath not to have sex with his wife while she was beast-feeding. Al-Nakh'i said, "I know of no situation in which the oath of *ila'* is valid except in anger. God said, 'Then, if they change their minds.' This means that if their anger passes."[59] Others said that it means if they change their minds and come back to their wives, even if their anger had not passed.

Al-Qurtubi reports that Ibn Sirin believed an oath to be binding even if it was not made in anger. Ibn Mas'ud, Ibn al-Thawri, Malik, al-Shafi'i and Ahmad ibn Hanbal all held the same view. Ibn al-Mufhhir said this was correct since the scholars agree that all other types of oath are valid, whether or not they are made in anger. Al-Qurtubi then adds, "Since the Qur'an supports this [view], we require evidence to restrict it to situations of anger, but this evidence is lacking."[60]

Differences of Opinion about Ila'

Fakhr al-Din al-Razi explains that all opinions about the period of *ila'* may be divided into four categories: (1) Ibn Abbas' view that a man's oath is invalid unless he swears that he will never have sex with his wife again; (2) the view of al-Hassan and Ishaq, who held an oath to be valid for whatever period, even a for single day; (3) the view of Abu Hanifa and al-Thawri, who said that the period of an oath must be for four months or more; and (4) the view of Imams Malik, al-Sha-

58. al-Suyûtî, *al-Dâr al-manthûr fi tafsîr al-ma'thûr*, I (Beirut: Dâr al-Maᶜrifa, n.d.), 270.
59. ibid. 271.
60. al-Qurtûbî, *al-Jâmiᶜ* li-ahkâm al-Qur'an, III, 109.

fi'i, and Ahmad that an oath is invalid unless a period for more than four months is specified.

The reason for these differences is that the verse gives us the waiting period prior to divorce, but does not say how long an oath of sexual abstention should be. Al-Qurtubi explains the views of some scholars in his book *Jami' li ahkam.*

> Ibn al-Mundhir says the meaning of return is return to sexual intercourse if a man is able to do so. If he had an excuse—such as sickness or imprisonment—he could resume sexual relations with his wife even after a long absence since, after all, she is his wife. If for example he had come home from a journey, recovered from an illness, or been released from prison, then there was no longer any reason why he should not have sexual intercourse with his wife. He must then either resume normal sexual relations with her or be separated from her, since the waiting period (for divorce) would be over.
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> Regarding evidence, al-Hassan, Ikrima, al-Nakh'i, and al-Awza'i said that when a man had a legitimate excuse for not having sexual relations with his wife, normal relations were considered to have resumed upon his testimony that this was so. Al-Nakh'i also said that his marital status was restored by testimony, and all oaths were consequently invalid. Ahmad ibn Hanbal said that if a man has an excuse for suspending sexual relations with his wife, his intent to resume sexual relations with her regularizes his marital status. Abu Hanifa added that if a man is unable to perform sexual intercourse he should simply say, "I have returned to her."
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> Another group of jurists said that after an excusable suspension of sexual relations, the only way to restore normal marital status was by sexual intercourse. Sa'id ibn Jubair said that this was (only) true if a man had been traveling or was in prison.[61]

Does a Man's Return to Sexual Relations Break His Vow?

A man, having made an oath of *ila'*, can return to sexual relations with his wife before the waiting period is over. In this case he will not have to divorce his wife but he may owe expiation for his oath. Some scholars said that there is no difference between saying, "By God, I will not talk to you" and then talking to her, and saying, "By God, I

61. ibid.

will not have sex with you" and then having sex with her. They said that since this is an oath, expiation was required for breaking it.[62] Others believed that the breaking of an oath of sexual abstinence is exempted from the normal expiation[63] since God said, "Then, if they change their minds, God is forgiving, merciful." Opponents of this view said the need for expiation is made clear elsewhere in the Qur'an and the Sunna, and that God only mentioned forgiveness and mercy here to draw our attention to exemption from punishment in the Hereafter.[64]

According to Ibn Kathir (d. 774/1373), the first opinion—that expiation is required— is stronger. This is the position supported by Omar, Othman, Ali, Ibn Mas'ud, Ibn Abbas, Ibn Omar, and Zaid ibn Thabit as well as many early scholars such as Abu Hanifa, and his companions, including al-Thawri.

Does Divorce Automatically Follow an Oath of Sexual Abstinence?

As for the words, "If they decide upon divorce, then [let them remember that] God hears, He knows," opinions varied. Does divorce take affect automatically at the end of the specified period of an oath, or is a ruling required from a Sharia court so that when a woman brings her case before a judge he can give her husband the opportunity to choose either to return to her or to divorce her? The Hanafis and a handful of jurists—who drew on accounts of more than ten Companions—said that if a man did not return voluntarily to his wife then he should be asked to divorce her. If he refuses, the judge should carry out a reversible divorce for him.[65]

Ibn al-Arabi (d. 543/1148), a Maliki jurist, said:

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62. al-Râzi, *al-Tafsîr al-kabîr*, VI, 88.

63. al-Qurtûbî says that some of the *tabi'în* (the first generations of the Muslims after the Companions) used to apply this verse generally to any oath to do good deeds in the future. They would not offer any penance for breaking this kind of oath and said that God had not mentioned any penance in the case of *ila'* ... the Prophet said, "He who has made an oath to do something but saw that doing something else was preferable, then let him abandon his oath, since abandoning it is its own expiation," *al-Jâmi' li-ahkâm al-Qur'an*, III, 109-10.

64. al-Râzi, *al-Tafsîr al-kabîr*, VI, 88.

65. al-Qurtûbî, *al-Jâmi'* li-ahkâm al-Qur'an, III, 111.

We understand that the verse means God will forgive their abstinence during the period of the oath, but after this is over they must either return to their wives or divorce them, for "God hears, He knows." The Hanafis believe it means that God will forgive those who return to their wives before the period of the oath expires. If they do not do this their intention for divorce is clear, and "God hears, He knows."

These are equal probabilities. Because of this the Companions considered it carefully. Al-Qurtubi said, "If these were [two] equal possibilities, the opinion of the scholars of Kufa—Abu Hanifa and his supporters—was stronger. They drew an analogy between the [maximum four-month] period of an oath and the four-month waiting-period prior to divorce, called *iddat*. The waiting-period is counted in months and menses. Its length is ordained by God. When it is over, conjugal relations are indisputably terminated and the man shall have no way into the woman's life except with her permission. The same applies to *ila'*, where divorce [automatically] takes place upon expiry of the oath, even if a man forgets [the end of the period] and does not return to his wife. . . and God knows best."[66]

Is Abstention from Sexual Relations the same as an Oath to do so?

Ibn al-Arabi said scholars believed that if a man abstained from sexual intercourse with his wife without any excuse, he should be regarded as having made an oath, even though he had not actually done so. His wife could make a formal complaint to a judge, who would then specify a waiting period from the time of her petition. The intention of her husband to pronounce *ila'* was assumed from his abstinence. Since the effect of the oath is to cause harm by denying the right to sexual intercourse, the oath of abstention does not have to be pronounced explicitly.[67] Al-Qurtubi mentions that "a man who spent two years without having sex with his wife should not be separated from her, but should rather be admonished and told to fear God and refrain from doing her any further harm."[68] Once, when asked about an oath not to speak to one's wife, or pay for her maintenance, or do her any similar type of harm, Ibn al-Arabi said, "While scholars'

66. ibid.

67. Ibn al-ʿArabî, *Ahkâm al-Qur'an*, I (Beirut: Dâr al-Fikr, 1974), 178.

68. al-Qurtûbî, *al-Jâmiʿ li-ahkâm al-Qur'an*, III, 106.

opinions differ, the truth is that this is *ila'* since the aim of it, as we have discussed earlier, is to inflict harm. God said, "But live with them in kindness" (4:19).[69] To conclude, we have now seen a variety of opinions about the meaning of this verse. Despite differences, all scholars remain closely bound to the text and its original objective, which is to prevent men from doing harm to women.[70]

An Example from the Sunna: A Ruling on Price control

Another example, this time from the Sunna, illustrates how a primary text can be interpreted in several ways, some of which are more justified than others. This example deals with commercial law.

Al-Shawkani reports in his book, *Nayl al-awtar*, that Anas said that prices rose in the time of the Prophet and the people said,"O Prophet! Can you not set prices?" He replied, "Surely God is the Sustainer, the Hand of Providence, the Provider, the Determiner of Value. I hope to meet the Almighty without anyone claiming that I have wronged them in any way, neither in property nor in blood."[71] Imam al-Shawkani commented on this and said Abu Hurayra reported on the authority of Ahmad and Abu Da'ud that a man came to the Prophet and said, "O Prophet, set prices!" The Prophet said, "I would rather petition God [for what you require]." Another man came and said, "O Prophet, set prices!" The Prophet said, "God raises and lowers prices."[72] The same account was reported by several Companions of the Prophet and so the prohibition of price control is firmly established.

Price control means that a ruler or government sets specific prices for commodities so that merchants may neither raise nor lower them. According to the evidence provided by these hadiths, prices should be left to the marketplace where normal economic processes will determine the cost of commodities according to the laws of supply and demand. Interference in the freedom of individuals, whether

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69. Ibn al-ᶜArabî, *Ahkâm al-Qur'an*, I, 178.

70. For discussions of jurists see al-Shawkânî, *Nail al-awtâr*, VI, 271-274; Ibn Hazm, *al-Muhallâ*, X, 42-9; and Ibn Qudâma, *al-Mughnî*, VII, 476-511.

71. al-Shawkânî, *Nayl al-awtâr*, V, 232-3; Ahmad, III, 156.

72. Abû Dâ'ûd, III, 272 (no. 3450).

producers, traders, or consumers, is an act of injustice, thus the Prophet explained, "I hope to meet the Almighty without anyone claiming that I have wronged them in any way, neither in property nor in blood."

Many jurists quote hadiths to support the prohibition of price control, saying that it is an act of wrongdoing. According to al-Shawkani, this was the opinion of most jurists who concluded that the people should be given control over their own property. Pricing is their own business. The ruler is enjoined to look after the interests of all Muslims, and not to give consumers' interests in low prices more consideration than vendors' interests in high prices. When interests conflict, the parties concerned should agree on a price. The Qur'an stresses "trade with it by mutual consent" (4:29).

Despite this view, al-Shawkani reports that Malik permitted price control. It seems that this was to protect the interests of consumers (a majority), against the interests of the producers (a minority). The Shafi'i's also allowed price control if prices were unusually high. Others made a distinction between food stuffs and other types of commodities. In later times, most of the Zaidi Imams permitted price control of anything other than human food and animal fodder. Al-Shawkani rejected these rulings, and argued that price control is normally prohibited. He supported his opinion with hadiths that he said should be applied both generally and absolutely. So long as the scope of the relevant hadiths was general, specific evidence was required to restrict their application to certain types of cases or conditions. According to al-Shawkani, no such evidence had been produced.[73]

If we look again at these hadiths we will see that they speak about natural rises in prices, which are not the result of manipulation of the markets or monopoly control of commodities. The Companions said, "The price rose." They did not say, "Protect us from these greedy traders." They did not accuse merchants of any wrongdoing or say they overstepped the limits in pursuing profits, or that they withheld goods from sale at fair and acceptable prices with reasonable profits.

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73. al-Shawkânî, *Nayl al-awtâr*, V, 232-3.

The Prophet told them, "You should rather petition God [for what you require]." If the high cost of living was due to commercial exploitation or fraud, the Prophet would have acted to protect the public welfare. This is what he meant when he said, "Each of you is a shepherd responsible for his flocks and the Imam is a shepherd responsible for his flock."[74] Since price levels were natural and not the result of unfair intervention of producers or suppliers in the market, the Prophet could only advise people to pray to God to lift the burden of high prices from them.

However, in the case of monopolies that control entire markets, or unscrupulous merchants who band together to drive prices up, price control is necessary to protect the weak against the strong. High prices also threaten public order since the poor may be driven by desperation to revolt and take revenge against those who exploit their most basic needs for enormous profits. The Hanafis argued that if the owners of a commodity become greedy and set exaggerated prices, the ruler should set its price in consultation with scholars to avoid public hardship.[75] Ibn Taimiya discussed this point in his book, *al-Hisba*. He said,

> Some price control is unjust and prohibited, and some is just and permissible. Price control may involve compelling people to sell goods for prices that are unacceptable to them, or prohibiting them from the lawful profits that God has permitted them. Any such action is forbidden. On the other hand, price control may guarantee justice between suppliers and consumers, by forcing suppliers to meet their responsibilities to provide goods to the market at a fair price. It may also prevent merchants from wrongdoing and from taking unfair advantage of the market through profiteering. The ruler must exert this type of control. According to the hadith reported earlier on the authority of Anas, price control is prohibited. This evidence is applicable if people are selling their goods in good faith without intending to exploit anyone, even if prices have risen, either because of scarcity of the commodity or because of an increase in demand. These are

74. al-Bukhârî, I, (11/11), 215.

75. Ibn Maudûd al-Mausilî, *al-Ikhtiyâr li'-taᶜâlîl al-mukhtâr*, VIII (Beirut: Dâr al-Fikr al-ᶜArabî, n.d.), 127; See also, Hamilton, trans., *al-Hadayah, a standard manual of Hanafi fiqh*, (Calcutta: 1789). *OJ*.

natural fluctuations. No one can be forced to sell at set prices simply because the market price is high. Price control is obligatory when merchants insist on selling their goods at artificially high prices despite people's need for these goods. In this case, they must sell at a recognized fair price. Price control here is simply making people follow what God has commanded them to do.[76]

Thus Ibn Taimiya not only permitted price control, but made it obligatory for goods and services as well. He also condemned the practice of artificially lowering wages as unjust. He said the ruler should intervene to set fair wages to protect the interests of workers. On the other hand, he said that if skilled laborers agreed to a strike to raise wages above fair levels, the ruler should intervene to protect the interests of employers. This also applies to producers who conspire against merchants and to merchants who conspire against consumers.

The ruler should not support any group against another, rather he should support justice. He should check the dominance of the strong over the weak, whoever the strong or the weak may be. This time the weak may be the vendor or the producer, another time he may be the buyer or the consumer. One time he may be the worker, another time he may be the employer. This is what Ibn Taimiya meant. Thus we see how the Sunna is meant to guide rather than to restrict. When it is restrictive it is only to prevent injustice and oppression.

THE SUSPENSION OF PROHIBITIONS

The flexibility of the Sharia is further illustrated by its handling of special human needs. Generally speaking the Sharia is easy to follow. Normally it is much easier than the heavy and awkward laws it supplanted. God ended the second chapter of the Qur'an with a supplication that says, "Our Lord, do not load us with a burden such as You loaded on those before us!" (2:286).[77] The Qur'an mentions that the scriptures of the Christians and the Jews told of a Prophet who would come to relieve them of hardship. "He allows them the good and disallows the bad. And he relieves them of their burden and the

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76. Ibn Taymîya, *al-Hisba fil-Islâm*, ed. Sayid ibn Muhammad ibn Abî Sa'da, (Kuwait: Dâr al-Arqâm, 1402/1982).

77. See also Ibn Kathîr, *Tafsîr*, I, 338.

shackles that have been on them" (7:157). The end of the verse that prescribes fasting says, "God wants you to have it easy—he does not want you to have it hard..." (2:185). After a verse dealing with marriage, God says, "God wants to lighten the burden for you, for man was created weak" (4:28). At the end of a verse about ritual purification we note, "God does not want to place a burden on you, but He wants to purify you and to perfect His favor to you, that you may give thanks" (5:6). This provides the basis for a fundamental rule of jurisprudence that difficulties should be relieved.[78] This rule makes possible special exemptions for the sick, travelers, and so on. These exemptions must be observed since the Prophet said, "God likes to see you make use of special privileges just as much as He hates to see you defy His commands."[79] There are, for example, special exemptions from the rulings governing purification, prayer, fasting, and pilgrimage. A complete list would be too large to be given here.

Sometimes difficulties are caused directly by a legal prohibition. When this happens it may be possible to temporarily suspend a prohibition.[80] The Qur'an makes exemptions from dietary prohibitions in case of hunger and famine in four different verses. Two of these were revealed at Makkah, in chapters six and sixteen, and two at Madina, in chapters two and five. The Medinan revelations are,

> O you who believe! Eat the good things We have provided you, and give thanks to God if it is He whom you worship. He has forbidden you only carrion, blood and pork, and anything which has been offered to other than God. But he who is driven by necessity, neither craving nor going to an excess, it is no sin for him. It is God Who is Forgiving, Merciful (2:172-3).

> Forbidden to you (as food) are dead animals, blood, pig meat and what has been dedicated to any other than God, strangled, beaten to death, killed by a fall, gored to death and what wild beasts have eaten from, except what you slaughter alive. What has been sacrificed to

78. See for example, Ibn al-Nujaim, *al-Ashbâh wal-nazâ'ir*, 37f.

79. Ahmad, II, 108.

80. There are other guidelines related to this, namely, that what has been permitted out of necessity should not go beyond the absolutely necessary, and "needs," whether general or specific, are to be regarded as "necessities." For further details, see Ibn al-Nujaim, *al-Ashbâh wal-nazâ'ir*, 43-6.

> idols and your swearing by the divining arrows, this is impiety. Today those who disbelieve are in despair of your religion. So do not fear them, fear Me! Today, I have perfected your religion for you, completed My favor to you and chosen Islam as a religion for you. And whoever is forced by hunger, not by will, to sin then truly God is Forgiving, Merciful (5:3).

This second verse confirms the one quoted above, though it gives more details about the types of meat, such as that from animals killed by strangling or beating. The first verse reads, "neither craving nor going to an excess." This is repeated in the second verse in a slightly different form, "not by will, to sin." A person should act according to necessity. When this involves doing something that is normally prohibited, this act must be without intent to violate the limits established by God. It must not be in order to fulfill some personal desire, to violate the rights of others, or to step beyond the bounds of necessity.

Compulsion

Compulsion, like necessity, may sometimes lift a prohibition. Someone who does something against his will is without guilt. The greatest sin a person can commit is to declare disbelief in God, but if a person does so under compulsion he may not be blamed. The Qur'an mentions this and says,

> Whoever has disbelieved in God after having believed—except for whoever has been forced and whose heart is still sure of the Faith... (16:105-6).

The Prophet said, "God forgave my nation for mistakes, for forgetfulness, and for what they have been compelled to do."[81]

Weakness

A necessity may arise because of weakness or frailty. Weakness can lead Muslims to seek the protection or alliance of non-Muslims, an act

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81. Ibn Mâja reported this on the authority of Ibn Abbas but his chain of transmission is weak; Ibn Nujaim quotes al-Suyûtî, who says that it is *hasan*; al-Manâwî, commenting on al-Suyûtî, said that it is a wonderful hadith that should count for half of Islam. Al-Manâwî, *Taisîr sharh al-jâmi'* al-saghîr, I (Riyadh: Maktaba al-Imâm al-Shâfi'î, 1408/1988), 263.

that is normally prohibited. In such a situation, it may appear that Muslims express fondness toward the disbelievers by seeking their help. To seek the help of disbelievers does not imply approval of disbelief, nor is it proof of treachery against Islam. An alliance with disbelievers may be to protect a vital interest. The help of disbelievers may be vital in a conflict with a mortal enemy. God said,

> Let not the believers take disbelievers for their friends instead of believers. Whoever does that is not with God in anything unless you fear them. God warns you of Himself. For God is the (final) journey (3:28).

Despite the uncompromising tone of these words, and despite similar warnings in other verses,[82] God has made an exception for the weak, and permitted them to protect themselves by showing their enemies the face of friendship.

Social Needs and Social Integrity

Just as the Sharia considers necessity a factor to exempt individuals from prohibitions when absolutely necessary, it also considers social and political needs as well. For example, when the Muslims are forced to go to war, they may be permitted to do what is prohibited under normal circumstances.

When they besieged the Jews of Banin-Nadhir, the Prophet and his Companions cut down their palm-trees and burned them to force the Jews to surrender and so protect themselves from further losses. The Jews deplored this and said the Prophet acted wrongfully and violated one of his own prohibitions. Verses were then revealed to explain the Prophet's behavior. God addressed the Prophet and his Companions and said, "Whatever palm-trees you cut down or left standing on their roots, it was by God's leave, and for him to shame the evildoers" (59:5). Some jurists went on to say that when an enemy took Muslims hostages, and used them to shield themselves in battle, Muslims may

82. Qur'an 5:51, "You who believe, do not take the Jews and Christians for friends. They are friends to one another. Whoever of you takes them for friends is (one) of them. God does not guide wrongdoing people" and 58:22, "You will not find people who believe in God and the Last Day loving those who oppose God and His Messenger, even if they are their fathers, their sons, their brothers, or their clan."

still attack them even if this means killing their hostages. This may be necessary if the alternative is to place many more Muslims in grave danger. While Muslims are prohibited from killing other Muslims, and the hostages would have been innocent of any crime, urgency and necessity may suspend normal legal impediments.[83] The necessity of defending the nation, of defending Islam, and preventing the victory of the disbelievers, may override the rights of hostages, whose reward remains with God.

Imam al-Ghazali criticized those who would not accept this. He said that to refuse to act decisively in this situation would amount to killing many more innocent people. We know that the Sharia gives precedence to the whole over the part. Preservation of the Muslim community from the victory of the disbelievers is more important than the preservation of one life. The objectives of the Sharia confirm this.

The same applies to the levying of taxes on the wealthy to fund jihad, supply armies, prepare fortifications, and provide other war-time necessities. This is supported, or rather imposed, by the Sharia, though several jurists do not admit that people should be made to pay more than this. Al-Ghazali says,

> We know that if we must choose between one of two kinds of harm, the Sharia guides us to avoid the greater harm and the most serious evil .... What each man pays (in extra taxes) is negligible in comparison with the potential risk to life and property if the Muslim community is deprived of order and security (through conquest by disbelievers).[84]

This principle also applies to the freeing of Muslim prisoners of war, despite the cost. Imam Malik said, "Muslims should redeem their prisoners, even if this costs them everything they own."[85] This is because the honor of these prisoners is a part of the honor of the nation, and the honor of the Muslim nation is given precedence over the rights one Muslim has over his property.

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83. al-Ghazâlî, *al-Mustasfâ*, I, 294-5.

84. ibid. 303-4; *see also* al-Shâtibî, *al-Iʿtisâm*, II, 121-2.

85. Ibn al-ʿArabî, *Ahkâm al-Qur'an*, I, 59-60.

THE VARIABILITY OF FATWAS

The Sharia is intended to serve the interests of people, to serve the interests of justice, and to protect society from the dangers of tyranny and oppression. This is what we should consider when interpreting legal texts and applying principles of law. This means that jurists should not stick to a single invariable position, constantly referring to it in fatwas, legal rulings, teaching, writing, and legislation, despite changes of time, place, situation, and custom. A global view of the objectives of the Sharia should always be kept in mind when passing judgment on any particular matter.

Scholars such as Ibn al-Qaiyim tell us that "fatwas may change with time, and according to place, situation, local custom, and intention." He has included an interesting chapter about this in his book *I'lâm al-muwâqi'în*. Here he introduces the topic to his readers:

> The changing nature of fatwas is of great importance. Ignorance of it leads to a serious misunderstanding of the Sharia. The result of this is that difficult and impossible things may become obligatory. The Sharia is the guardian of the highest levels of interests and cannot be used to sanction this. The essence of the Sharia rests on wisdom and the pursuit of human interests in the life of the world and in the Hereafter. The Sharia is justice at large, mercy at large, interest at large, and wisdom at large.[86]

Permanent and Variable Rulings

This does not mean that all legal rulings will change with time, or according to place or local custom. Some rulings are permanent and may not be changed whatever the circumstances or conditions. Ibn al-Qaiyim says,

> Rulings, *ahkam*, fall into two categories. Those belonging to the first category take a fixed form and do not change with time or place. These are not subject to the interpretations of jurists and include the rulings on religious obligations, prohibitions, and criminal punishments prescribed by the Qur'an and Sunna. Those rulings belonging to the second category are variable and may change to meet the needs of time, place and situation. Discretionary punishments are included in

86. Ibn al-Qaiyim, *I'lâm al-muwâqqi'în*, III, 14-5.

this category since they rest on a consideration of public interest and welfare.[87]

This position is solidly supported, not only by Ibn al-Qaiyim, but also by many other scholars, such as al-Qarafi and the Hanafi scholar, Ibn Abidin (d. 1252/1836)[88]

Qur'anic Evidence for the Variability of Legal Rulings

What is the evidence from the Qur'an for the variability of fatwas? Ibn al-Qaiyim gave several examples of this from the practice of the Companions, but he never produced any evidence to support it from the Qur'an, nor are we aware of any other jurist who attempted to find such evidence.

A close examination of the Qur'an does, however, reveal evidence to support this important principle, particularly with respect to the category of verses some jurists call "abrogated and abrogating." These verses are not abrogated, nor do they abrogate anything. Each of them was revealed for a purpose and within a specific context. For example, God said in the Qur'an,

> Prophet, urge the believers to fight. If there are a patient twenty of you, they will overcome two hundred, and if there are a patient hundred of you, they will overcome a thousand of those who have disbelieved, because they are a people who do not understand, (8:65).

This is immediately followed by a verse that says,

> Now God has relieved you, for He knew that there was weakness in you. So if there are a patient hundred of you, they will overcome two hundred, and if there are a thousand of you, they will overcome two thousand by permission of God, for God is with the patient, (8:66).

Sheikh Rashid Rida explains these verses saying:

> The least the believers can do against the unbelievers in combat is for a hundred of them to vanquish two hundred and a thousand to

87. Ibn al-Qaiyim, *Ighâtha al-lahfân*, I (Beirut: Dâr al-Maʿarifa, n.d.), 346-9.

88. See Ibn ʿAbidin, *Nashr al-ʿurf fi binâ' baʿd* al-ahkam ʿala al-ʿuruf, in *Majmuʿ risâ'il ibn ʿAbidîn*, II (Beirut: Dâr 'Ihyâ al-Turâth al-ʿArabî, n.d.), 112.

> vanquish two thousand. This describes the situation of weakness for which the special dispensation discussed above was intended, and in which the believers found themselves at the time of the Battle of Badr when these verses were revealed. At Badr, the Muslims were poorly equipped to fight and had only one or two horses. They had gone out to receive a caravan and found a battle ready army that outnumbered them by more than two to one. Later, when the Muslim force was complete and they were resolved to fight as God had commanded them, they fought and vanquished more than ten times their number.[89]

Some scholars believe that the first of these two verses is abrogated by the second. The evidence for this is that the verse says, "Now has God releived you," and offers a dispensation for weakness. These scholars are mistaken since abrogation of something cannot be concurrent with its revelation as a command to be fulfilled.

These two verses were revealed simultaneously. Al-Bukhari reports that Ibn Abbas said the verse, "If there are patient twenty of you, they will overcome two hundred, and if there are patient a hundred of you, they will overcome a thousand of those who have disbelieved," meant that each Muslim should confront ten unbelievers. The second verse, "Now has God relieved you," conditionally lightened the obligation to fight, which remained.

This hadith does not support the position that the second verse repeals the first, as well as the ruling it contains. The first verse establishes that the Muslims must fight when they are strong. The second verse provides an exemption based on weakness. The second verse establishes a ruling for a specific situation, a situation other than that for which the first verse was revealed. This is evidence from the Qur'an to support the variable nature of legal rulings.[90] Al-Suyuti describes how abrogation falls into many categories. The third of these includes Qur'anic rulings made in the context of a changing situation. When they were weak, God ordered the Muslims to be patient and to

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89. Rashîd Rida, *Tafsîr al-manâr*, X (Beirut: Dâr al-Maᶜârif, n.d.), 79.

90. The same applies to the verses dealing with patience, forgiveness, tolerance, and avoidance of unbelievers which most scholars believe were abrogated by the 'verse of sword.' These verses were revealed for their own time and purpose, as was the verse of the sword.

forgive their enemies, but later the Muslims were told to fight. The reasons underlying a ruling may change, and so the ruling itself may also change, but this is not abrogation. Abrogation means the total abolition of a ruling, which then has no legal force at all.[91]

Evidence for the Change of Rulings in the Sunna

Anyone who studies the Prophet's Sunna will find that legal rulings change. In his book, *Talkhis al-hibbir*, Ibn Hajr points this out and quotes a hadith related by Abu Da'ud: "A fasting man asked the Prophet to give him permission to kiss his wife, which he received. Another man came and asked the Prophet for permission to do the same, but was refused. The one he gave permission to kiss his wife was old, while the one he prohibited from doing so was young."[92]

This saying is not reliably supported, *daᶜif*, and cannot be used as proof. It is, however, supported by another account contained in Imam Ahmad's *Musnad*. Ahmad tells us that Abdullah ibn Amr ibn al-As said, "We were with the Prophet when a young man came and asked him "Can I kiss my wife while I am fasting?""

No," the Prophet said.

Then an old man came and asked, "Can I kiss my wife while I am fasting?" "

Yes," the Prophet answered. As we were looking at each other, the Prophet said, "I know why you are looking at each other. The old man controls himself."[93]

Many other accounts show that rulings can change according to circumstances. For example, Salama ibn al-Akwa relates an account according to which the Prophet said, "Whoever sacrifices an animal [on the Feast of the Sacrifice] should not find any of it in his house on the third morning after its slaughter." A year later someone asked him, "Are we to do what we did last year?" He said, "Eat, feed, and save.

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91. al-Suyûtî, *al-Ittiqân fî ᶜulûm al-Qur'an*, II (Beirut: Mustafâ al-Halabî, n.d.), 21.

92. Ibn Hajr, *Talkhîs al-hibbîr*, VI (Cairo: Azhar, 1979), 187; Abû Dâ'ûd, II, 313 (no. 2387).

93. Ahmad, II, 220; Ahmad Shakir said that the *isnâd* of this hadith is *sahih*, despite the fact that it contains the name of Ibn Lahi'a. Ahmad Shâkir, *al-Musnad lil Imâm Ahmad ibn Hanbal*, XII (Dar al-Mᶜârif: Cairo, 1958), 16 (no. 7054).

Last year was difficult for people, and I wanted you to offer help to others."[94]

While most jurists believe that this prohibition was later reversed, like the one about visiting graves, this is not the case. This prohibition was a response to a particular situation and became irrelevant once this situation had changed. Imam al-Shafi'i discusses this in his book, *al-Risala*, and points out that the prohibition on saving meat from the Festival was because of the arrival of many new immigrants at Madina. The Prophet himself explained this saying, "I acted for the sake of those who had only recently arrived."[95] The new immigrants were dependent on the hospitality of others, and so the Prophet forbade saving meat from the Feast of the Sacrifice that year. Once these new arrivals had settled, there was no longer any reason for this prohibition. The Prophet explained this again later when he said, "I had forbidden you to save meat from the [Feast of the] Sacrifice. Now eat, feed others, and save."[96] Clearly, rulings can change to take account of new situations.

Imam al-Qurtubi argues that this earlier ruling had not been overturned. He said,

> The ruling no longer applies since the reason for it has changed. There is a difference between reversing a ruling (abrogation), and not being able to apply it because there is no longer any reason to do so. Something that has been reversed, or revoked, has no legal force. Something that is not applicable in one situation may come into force again if the situation demands it.[97]

The "Rightly Guided Caliphs" noted this point. For instance, once in his sermon before the Festival Prayer on the Feast of the Sacrifice, Ali ibn Abi Talib prohibited people from saving meat for more than three days and reminded them that the Prophet once forbade this. Those who thought that the Prophet's earlier ruling had been overturned were confused and some of them said that perhaps Ali had not

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94. al-Bukhârî, VI, (73/16), 239.
95. The hadith is also reported in Ahmad, VI, 51.
96. Ibn Mâja, II, 205 (no. 2558/3160).
97. al-Qurtûbî, *al-Jâmi'* li-ahkâm al-Qur'an, XII, 47-8.

heard that this had been reversed, but Imam Ahmad later explained that this proved Ali knew that it was sometimes possible to save this meat, and that, like the Prophet he invoked this prohibition because of hard times. Ibn Hazm (d. 456/1064) said the three day limit was in response to a certain situation. If peoples' needs can only be met by distributing all of the meat from the Festival, then none should be saved, not even for a single night.[98]

So we see that under certain circumstances the Prophet prohibited the saving of meat from animals slaughtered for the Festival of the Sacrifice, while in a different situation he gave different instructions. And as we saw in the beginning of this section, the Prophet sometimes gave different answers to the same question. Each person got the answer that suited his situation. For example, someone once asked the Prophet for general advice. He said, "Don"t become angry.'[99] Later, when someone else asked him for advice he said, "Say: I believe in God and then be upright in all you do."[100] Later still, he said, "Be careful of what you say."[101] Each of these people got an answer to fit his own situation.

There are many sayings that speak of the merits of jihad. According to these, nothing can equal jihad except for impossible deeds such as perpetual prayer and fasting. Yet, Abu Hurayra reports that when the Prophet was asked, "What is the finest of deeds?" He answered, "Faith in God and his Prophet." Someone then asked him, "Then what?" He said, "Jihad in the path of God." Again someone asked, "Then what?" He replied, "A Pilgrimage accepted by God."[102] According to this, jihad is the finest deed after faith. Bukhari reports that A'isha said, "O Prophet! Since jihad is the best of deeds, should we not then go?" He said, "No, for women the best jihad is an accepted Pilgrimage."[103] When the questioner was a woman, the Prophet's answer changed.

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98. Ibn Hajr, *Fath al-bârî*, XII (Beirut: Mustafâ al-Halabî, n.d.), 120-5.
99. al-Bukhârî, VII, (78/76), 100.
100. Muslim, I, (13/62), 65.
101. Abû Dâ'ûd, IV, 124 (no. 4343).
102. al-Bukhârî, II, (25/4), 141.
103. ibid.

There are many more examples of this to illustrate how a ruling can be different depending on who asks the question. If this is so, how much will they change with time and place?

Precedents from the Time of the Companions and the Rightly Guided Caliphs

The Companions and the Rightly Guided Caliphs made extensive use of rulings. They often changed them to suit changing situations. There are many examples of this but we will quote only a few of them here.

Punishment for Drunkenness

In the time of the Prophet there was no specific punishment for drunkenness, and discretionary punishment sometimes took the form of a rebuke. Al-Bukhari relates that Utba ibn al-Harith said, "A man called Nu'man or Ibn Nu'man was brought drunk to the Prophet. The Prophet was angry and told those who were in the house to beat him, so they beat him with palm branches and sandals. I was among those who took part in this."[104]

There is a another hadith in *Sahih al-Bukhari*, narrated by Abu Hurayra who said "A man was brought drunk to the Prophet who said, "Beat him," so we beat him; some with their hands, some with their shoes, and some with their cloaks. As he was leaving some of them said, "Let God bring shame unto you!" The Prophet told them, "Do not say that. Do not back the devil against him."[105] Using sandals for such beatings is not usual for mandatory penalties, *hudûd*. In another account, Ibn Shihab was asked how many stripes the Prophet prescribed for drunkenness. He answered, "The Prophet did not impose a specific punishment. He used to order those who were around to beat the man with their hands and shoes. When the man cried out, 'O Prophet! Enough,' he would have them stop."[106]

According to reports passed down by Abu Da'ud, al-Nasa'i, and Ibn Hajr, the Prophet did not always beat people who drank alcohol. Ibn

104. al-Bukhârî, VIII, (86/4), 13-4.

105. al-Bukhârî, VIII, (86/4), 14.

106. al-San'anî, *al-Musannaf fil-hadîth*, VII (Beirut: al-Maktab al-Islâmî, 1403/1983), 377.

Abbas said, "A drunken man was being taken to the Prophet, but as they approached al-Abbas' house, this man rushed to impose himself upon al-Abbas' hospitality. When the Prophet was told about it he laughed and did nothing else."[107] Al-Tabari (d. 380/1000) reports a case like this, also on the authority of Ibn Abbas. He says, "The Messenger of God did not flog drunkards until later. At the time of the battle of Tabuk a man came by the Prophet's room drunk. The Prophet said, "Someone should take him by the hand and lead him where he should go."[108]

Apparently, because of the Arabs' recent experience with drinking, the Prophet treated drunkenness leniently at first. When the Sharia was finally established he beat and flogged drunkards, but still did not specify a punishment. According to most narrations, he punished drunkenness with about forty stripes, sometimes more, sometimes less. For example, Anas said that the Prophet used to have drunkards flogged "about forty" stripes, but he can give us only an approximation.

Al-Baihaqi (d. 458/1066) said drunkenness was more common during the caliphate of Abu Bakr than in the time of the Prophet, peace be upon him. Abu Bakr used to ask, "What if we impose this and that." He was careful to stay near to the practice of the Prophet, so he never exceeded forty stripes.[109]

When he was Caliph, Omar ibn al-Khattab consulted people about flogging for drunkenness. He complained that people were drinking audaciously. The drinking of alcohol could result in slander, since drunks are given to mindless gibbering. Ali said, "If someone gets drunk he talks irrationally, and if he talks irrationally he slanders, so his punishment should be the same as that of slander." Ali, as well as Omar, flogged drunkards eighty stripes (the mandatory punishment for slander).[110] Thus, punishment for an offense could rely on the reasonable assumption that it would occur. When Khalid ibn al-Walid

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107. Ibn Hajr, *Fath al-bârî*, XV, 77.

108. ibid.

109. al-Baihaqî, *al-Sunan al-kubrâ*, VIII (Beirut: Dâr al-Fikr, n.d.), 320.

110. al-Sanᶜanî, *al-Musannaf fil-hadîth*, VII, 378; al-Baihaqî, *al-Sunan al-kubrâ*, VIII, 321; Ibn Hajr, *Fath al-bârî*, XV, 67.

wrote to Omar to complain that people were engrossed in drinking and had become indifferent to punishment, Omar sought advice about what to do. According to Imams Muslim and al-Nasa'i, Abdul Rahman ibn Auf told Omar, "The lightest penalty is eighty stripes." Omar then flogged drunkards eighty stripes.[111]

Abdul Rahman ibn Hammam relates a report from Ubaid ibn Omair who says,

> They used to beat drunkards with their hands and sandals: this was done in the time of the Prophet, of Abu Bakr's Caliphate, and also during the early part of Omar's rule. Since Omar was afraid that drunkards might die from severe beatings, he limited the punishment to forty stripes at first. When this did not stop people from drinking he made it sixty stripes. When they persisted he made it eighty stripes and declared this to be the minimum penalty [according to the Qur'an].[112]

Ibn Hammam agreed that eighty stripes is the minimum penalty permitted by the Holy Qur'an. This is lighter than penalties for adultery or theft.

Sometimes Ali punished drunkenness with more than eighty stripes. He flogged the poet al-Najashi al-Harithi eighty stripes for his drinking during the day in Ramadan. He held him until the next day and then flogged him another twenty stripes. Ali said, "I flogged you twenty [more] stripes for your boldness against God and your breaking the fast in Ramadan."[113] Other sources say that Ali preferred not to impose more than forty strokes.

Omar flogged and exiled those who drank during Ramadan since this represented a serious violation of the sanctity of the Holy Month. Once he flogged an old man who drank alcohol during the day in Ramadan eighty stripes and exiled him to Syria.[114] This shows that punishment can vary with the situation of the criminal, his physical fitness, his reputation, his persistence, and his indifference to punish-

111. Abu Da'ud and Nasa'i. The hadith is on the authority of ʿAbdul Rahmân ibn Azhar as reported in Ibn Hajr, *Fath al-bârî*, XV, 67.

112. al-Sanʿanî, *al-Musannaf fil-hadith*, VII, 377-8.

113. al-Sanʿanî, *al-Musannaf fil-hadith*, VII, 382; al-Baihaqî, *al-Sunan al-kubrâ*, VIII, 321.

114. ibid.

ment. Past offenders may be more severely dealt with than those who are not normally of bad character. Omar ibn Abdul Aziz said, "The more persistently people break the law, the more severely they will be punished."[115]

Although Ali ibn Abi Talib advised Omar to flog drunkards eighty stripes, he only flogged them forty stripes himself.[116] There is no contradiction here since neither the Qur'an nor Sunna specify the punishment for drunkenness. It is, therefore, a matter of discretion. Ali might have seen people of his time keeping away from alcohol and so decided to impose the lighter punishments of earlier times under the Prophet and Abu Bakr.

Imams Bukhari and Muslim report that Ali said, "I would not feel responsible for the death of anyone upon whom I had passed judgment, except for the drunkard. If one of them dies from a beating I have ordered, I will pay his family compensation, *diya*, since the Messenger of God left us no instructions (of an appropriate punishment)."[117]

The actions of the Companions prove that the Prophet did not set a particular punishment for drunkenness. If he had done this they would not have resorted to consultation and personal opinion to settle the matter, and they would not have drawn analogies between drinking and the slander. Because they did not find any evidence to establish a punishment for drinking alcohol their rulings changed over time and according to circumstances. This is why Omar flogged drunkards forty, sixty, and, when they were persistent, eighty stripes.

Al-Tabari and others quote several scholars who said that there was no established punishment for drunkenness, and that this was a matter for the discretion of the courts. Ibn Abbas and Ibn Shihab say that the Prophet used to decide the number of stripes according to the situation.[118]

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115. Ibn Hajr, *Fath al-bârî*, XV, 76; al-Dâraqutnî, *Sunan*, III, 157.

116. This is reported in some narrations, though others dismissed it as baseless.

117. al-Bukhârî, VIII, (86/4), 14.

118. Ibn Hajr examines the evidence to support an obligatory penalty for drunkenness; see, *Fath al-bârî*, XV, 77.

In *al-Durar al-bahiya*, Imam al-Shawkani said, "He who drinks an intoxicant of his own free will, should be flogged, forty, less than forty, or more than forty stripes, even with a shoe, according to the discretionary ruling of the Imam." This view was confirmed by Siddiq Hassan Ali in his commentary on al-Shawkani.[119] He reviewed al-Shawkani's evidence and concluded that the punishment for drunkenness properly belongs among the discretionary punishments, or *ta'ziz*, and not the obligatory punishments. It is also clear that Imam Bukhari agreed with this view. Ibn Hajr points out that Imam Bukhari did not give any explanation about a particular number of stripes, nor did he report any hadith regarding this.[120]

In conclusion, the Companions made several decisions about how to punish drunkenness. These varied from time to time and from one situation to another. The Qur'an and Sunna do not set any specific penalty for drunkenness. Rulings specifying punishment for drunkenness may change according to circumstances.

Zakât al-Fitr

Zakât al-fitr is the tax due from all Muslims at the end of Ramadan. This should be distributed to the poor on the Feast of the Sacrifice, the festival day that marks the end of the fast.

The Prophet set a mandatory contribution of one *saa* of dates, raisins, barley or cheese. Nonetheless, several Companions reported that later a half gallon of wheat was considered the equivalent of one gallon of dates or barley.

Ibn al-Mundhir said that there was no solid information about the amount of wheat that should be given, since wheat was not generally available in Madina. It became commonly available in the time of the Companions and they thought that half a gallon of it was equivalent to one gallon of barley.[121] Abu Sa'id al-Khudri said,

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119. See Siddîq Hasan b. ʿAlî, *al-Rawda al-nadiya (sharh al-durar al-bahiya lil-Shawkânî)*, II (Beirut, Dâr al-Maʿrifa, 1398/1978), 283-4.

120. Ibn Hajr, *Fath al-bârî*, XV, 78-80.

121. See Yûsuf al-Qaradâwî, *Fiqh al-zakât*, II, 935-6; Ibn al-Mundhir narrated, on the authority of Othmân, that half a *saa* of wheat was given as *zakât al-fitr*.

> We used to give away a gallon of provisions: dates, barley, raisins, or cheese, for *zakât al-fitr* when the Prophet was with us. We did this until Mu'awiya came to Madina. He said that half a gallon of wheat was the equivalent of one gallon of dates and people then acted according to what he said.[122]

The Companions, Ibn al-Mundhir, and others, sanctioned half a gallon of dates for *zakât al-fitr*, although since the time of the Prophet it had been usual to give one gallon. In their time wheat was more expensive than other foods like barley and dates. To take account of this, they suggested half a gallon of wheat to equal one gallon of a cheaper staple food.

Zakat on Horses

Imam Ahmad and al-Tabarani (d. 260/873)[123] related how some people from Syria came to Omar asking to pay taxes on their horses and slaves. They said, "We have new wealth, horses and slaves, which we would like to purify." Omar told them, "I will do what my two companions did before me." When he consulted the Companions, Ali said, "This is fine if it is not considered tribute, and taken from them once you have gone."[124]

Abdul Razzaq ibn Hammam and al-Baihaqi both tell the story of Abdul Rahman ibn Umaiya who once bartered a hundred young she-camels for a horse. Later the vendor, a Yemeni, changed his mind. He went to Omar and said, "Ya'la and his brother robbed me of my horse!"

Omar had Ya'la brought to him to explain. Omar asked, "Is it true that you pay so much for horses? I did not know that a horse would cost as much as this. We collect zakat on every forty head of sheep but don't collect anything for horses. From now on, we'll collect one dinar for every horse."[125]

Accounts do not confirm which of these incidents happened first, but they probably happened in this order. In the first account, Omar

122. al-Tirmîdhî, II, 91(no. 668).

123. Sulaiyman b. Ahmad b. Ayub, an important early scholar of hadith. *OJ*.

124. Yûsuf al-Qaradâwî, *Fiqh al-zakât*, I, 229.

125. ibid. 226.

hesitated to do something that the Prophet or Abu Bakr did not do. First he consulted the Companions and then accepted the advice of Ali. The second account does not say that he asked anyone. The appropriate action was perfectly clear to him. He decided on the basis of what he had seen and heard, and ordered his officers to collect one dinar on every horse. Later he changed his mind about zakat on horses. He did not feel obliged to stick to his first decision because the circumstances had changed. When he was asked about this discrepancy he said, "That was according to what we knew then, and this is according to what we know now."

"Those Whose Hearts Have Been Reconciled"

During his Caliphate, Omar decided that zakat should no longer be given to those who were known in the Prophet's and Abu Bakr's times as "those whose hearts have been recently reconciled." He said, "God has invigorated Islam and enriched them!" This was not a reversal of anything in the Holy Qur'an and Sunna, nor was it meant to exclude this class of people forever as beneficiaries of zakat. It is not possible to speak of abrogation, the Revelation already having been completed. How could Omar and the Companions reverse anything the Qur'an and the Sunna had established?

Omar did not see any need for further reconciliation, *ta'lif al-qulub*. He prevented the use of this as a pretext for taking zakat. It is the responsibility of the ruler to allocate this money to those who qualify for it in consultation with scholars. The ruling about this may change from time to time, and from one situation to another.

Omar's Ruling on Triple Divorce

Ibn Taimiya mentions Omar's decision to accept the validity of a triple divorce pronounced at a single time, although he knew that this should count as only one, reversible divorce.[126] When Omar saw men commonly using the triple divorce he decided to punish them by accepting it. He thought that when men realized that if they declared a triple divorce they would be irrevocably separated from their wives,

126. Ibn al-Qaiyim, *al-Turuq al-hukumiya*, 16-7; and *I'lâm al-muwâqqi'in*, III, 41.

they would then stop doing this. The Companions supported Omar in this. Omar explains, "People now take lightly actions that they used to consider seriously. Let us hold them to their word."

Omar saw that making this kind of divorce legally valid was the best way to protect public interests. He knew that this kind of divorce was considered a simple divorce in the time of the Prophet and Abu Bakr, and he had treated it like this in the early part of his own Caliphate. Later, people overstepped the limits and started to tamper with God's Revelation.

Distribution of Captured Land

Land that the Muslims captured during their early conquests had been distributed among those who participated in the campaigns. This practice was challenged during Omar's Caliphate. Bilal and several other Companions thought that the newly conquered lands to the north should be distributed among those who conquered them. They said the Prophet had done this at Khaybar after it was taken from the disbelievers and that this position was supported by the general meaning of the verse, "And know that whatever you plunder, a fifth of it is for God" (8:41). They said it was understood that the other four-fifths were for the conquerors. Some reports however state that the Prophet distributed only half the land at Khaybar and that he left the other half as an endowment.

Omar and some other Companions, including Ali and Mu'adh, thought conquered land should be left in the hands of its owners if they paid a land tax, *kharaj*. This policy would serve the interest of all Muslims, then and in days to come, and would provide an endowment for posterity. Omar did not need to redistribute captured land in the rural areas of Iraq, nor indeed in other countries he conquered, and later Caliphs followed the same practice.

As for the Prophet's re-distribution of captured land at Khaybar, it is reported, as we mentioned earlier, that this affected only half the land at Khaybar while the other half was left as an endowment, *waqf*. In the early years of Islam, the pressing need for farm land meant that re-distribution was in the best interests of the Muslims. Later, the situation changed. It became preferable to earmark all captured land for religious endowments. Omar said, "Had it not been for later generations, I would have distributed the land as the Prophet did at

Khaybar." He endowed the land, though he knew that this was not what the Prophet had done. He said that the Prophet's action at Khaybar had not set a legally binding precedent, since it was based on interest.[127] At Khaybar, the Prophet acted in the interests of the state, of which he was head.

The Prophet's example may show that something is permissible. It does not, however, prove that it is obligatory. This is why Omar and his companions did not follow the Prophet's example this time.

The Sharia never sanctions anything that contradicts the interests of the community. Omar, Ali, Mu'adh and others who shared their views, felt that the interests of the Muslims were best served by endowing captured land. This is clear from their arguments and from the evidence they offered to support them.[128]

Omar's Rulings in the Year of Famine

In the Year of Famine, known as *Am al-Ramada*, Omar passed two important rulings. First, he postponed the collection of zakat on livestock, such as camels, sheep, and cattle, until rain fell and sufficient pasture was available. Abu Ubaid records in his *Kitab al-amwal*, that Ibn Abi Diyab said, "When rain fell, (Omar) told me to collect two-years" zakat, distribute one year's contribution, and bring the other year's contribution to him." He did not write off zakat that year, but deferred its collection so that people would not be put into further difficulty. His second important ruling that year, was to suspend punishment for theft.[129] According to Abu Ubaid he said, "There shall be no amputations in the year of draught." Ibn al-Qaiyim reports that Omar said,

> A hand shall neither be amputated for a palm-tree, nor in a year of famine.
>
> Al-Sa'di said, "I asked Ahmad ibn Hanbal about this hadith and he said, 'A bunch of grapes forsaken, a palm tree overlooked, and the year was that of the famine.'"
>
> "Do you support this view?" I asked.

127. Abû Yûsuf, *Kitâb al-kharâj*, 132, para. 41.

128. ibid, 117-35 passim.

129. Abu ᶜUbaid, *Kitâb al-amwâl*, 374, 559.

"Do I support what?" he said.

"That if a person steals something during a famine, he should not have his hand cut off."

"No," he said, " I don't." And he added, "Only if he is desperate and driven by hunger."[130]

Al-Sa'di explains that this is similar to another incident. Two slaves belonging to a man called Abdul Rahman ibn Hatib stole a she-camel belonging to someone from Muzaina. When they were taken to Omar they confessed their guilt. Omar sent for Ibn Hatib. When he arrived he was told

Two (of your) slaves have stolen a camel belonging to someone from Muzaina and freely admit their guilt.

Then Omar told Kathir ibn al-Salat to go and cut off their [right] hands. But no sooner had he said this than he called them back and said, "By God, if I hadn't known that you use them and starve them to the point that they may eat what God has forbidden them, I would have cut off their hands. Now that I have not done so, I will, by God, fine you painfully."

"How much do you want for your camel?" he asked the man from Muzaina.

The man said, "Four hundred [dinars]."

Then Omar told ibn Hatib,"Go and give him eight hundred."[131]

Ibn al-Qaiyim says Imam Ahmad agreed with Omar about suspension of a punishment for theft during a famine. This ruling is consistent with the general principles of the Sharia and depends upon analogy. In times of famine, people may have to steal to survive. It is the responsibility of the wealthier among them to sell them food cheaply or distribute it free of charge. This is to prevent people from stealing what they need. Anyone who is able should give food away as an act of charity. Under these circumstances, the penalty for theft is suspended. The legal evidence for this is particularly strong. The public may even negotiate with owners of large stores of food to get what they need to survive. During a famine, it is difficult to distin-

130. Ibn al-Qaiyim, *I'lâm al-muwâqqi'în*, III, 22-3.

131. ibid.

guish between those who steal out of necessity and common thieves. Because of this the punishment for theft may be suspended. This is what Omar did, although the sources tell us that if he knew they were not in dire need of what they had stolen he would still cut off the hands of thieves.[132] Omar did not really suspend punishment, but he took an additional factor of doubt about motives into account. If a thief's motive was in doubt, the prescribed punishment was no longer thought to be obligatory.

The Recording and Collation of the Qur'an

The first collation of the text of the Qur'an into a single document occurred during the Caliphate of Abu Bakr. At the time of the Prophet the Qur'an was first memorized, and then recorded using whatever materials were at hand. Palm branches, flat white stones, bones, and pot shards we used since paper was not normally available. The Prophet did not have the Qur'an written down completely because it was revealed to him in small portions and as the occasion required. He continued to receive parts of the Revelation until shortly before his death. The time had come for The Qur'an to be collected and published. This new situation required a new response.

The first uprising against Islam happened when Abu Bakr was Caliph. Many Companions who had memorized the Qur'an were killed in the fighting. Seven hundred perished in the Battle of Yamama alone. Omar went to Abu Bakr to suggest that the Qur'an be written down while the men who could testify to its authenticity were still alive. These were Companions such as Ubay, Ibn Mas'ud and Zaid, who had learned the Qur'an from the Prophet, upon whom be peace. Abu Bakr hesitated at first. He told Omar, "How can I do something that the Prophet did not do?" But Omar answered him saying it was a good thing.

Abu Bakr said that Omar continued to press for this until God brought it into his heart. He then went to the Prophet's scribe, Zaid ibn Thabit, and asked him to collect and record the Qur'an. Zaid hesitated and asked,

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132. ibid.

"How can you do something that the Prophet did not do?"

"By God, it is good," said Abu Bakr.

"I continued to resist this," Zaid said, "until God brought into my heart what He had brought into Abu Bakr's heart."

Zaid gleaned the Qur'an from the hearts of those who had memorized it and collected items on which it was written. He then wrote it down and gave it to Abu Bakr who kept it until he died. When Omar became Caliph, he received Othman's manuscript of the Qur'an. This was finally passed on to Omar's daughter Hafsa.[133] This Qur'an was not for general use; it was an official copy to be preserved for reference when necessary. The recording of the Qur'an was undoubtedly a great event in the history of Islam. God guided the Companions to it since their purpose was to preserve the Qur'an. God said, "It is Us Who have revealed the reminder, and We indeed are the Guardian of it" (15:9).

By the time of the third Caliph, Othman ibn Affan, Islam had spread far beyond the Hijaz. Many of the Prophet's Companions had gone to settle in the new territories and people began to bicker about how the Qur'an should be read. Their differences widened and they increased in narrow-mindedness and in stubbornness. Hudhaifa reported that people from Syria and people from Iraq were brought together at the time of the Armenian campaign. There they began to argue and each party claimed that what they had been taught was correct. They bickered and quarreled, insulted one another, accused one another of disbelief, and so each party disowned the other. Hudhaifa was so concerned at what he saw that when he returned to Madina he went directly to see Othman, even before he went to his own house.

"Rescue this nation before it has perished."

"From what?" asked Othman.

"It is the Book of God," he said. "I was on the last campaign and there the people of Syria, Iraq and Hijaz had gathered," and he told them what he had seen.

"I fear that they will argue over their Book just as the Jews and the Christians have done."[134]

133. For this account see al-Qurtûbî, *al-Jâmi' li-ahkâm al-Qur'an*, I, 43; and al-Suyûtî, *al-Ittiqân fî 'ulûm al-Qur'an*, I, 57.

Othman decided to record a standard copy of the Qur'an and to send an example of it to all the provinces so people would have a reference by which to settle their differences. This would protect them from disagreements and fighting.

When he gathered the Companions and asked for their opinion, they agreed to abide by his decision. Othman then ordered Hafsa to send her copy of the Qur'an to be transcribed then returned to her. Hafsa did this and then Othman assigned Zaid ibn Thabit, Abdullah ibn al-Zubair, Sa'id ibn al-As, and Abdul Rahman ibn al-Harith ibn Hisham to record a fresh copy. Othman returned the original to Hafsa, distributed the new copy and ordered all other examples to be burned.[135]

Imam al-Qurtubi said, "Othman did this after having gathered and consulted the *muhajirin*, the *ansar* and the representatives of the Muslims. His proposal was to collect and record the Qur'an as it had been received from the Prophet, peace be upon him. All variations to the text were to be abandoned. They were in total agreement with this, may God bless them all.[136]

The recording of a master copy of the Qur'an and burning all previous ones had been dismissed by some people as something new. They said it was an innovation in the accepted practice of the Muslims. Ali came to the defense of Othman and supported his action. Swaid ibn Ghafala reports that Ali said, "O people! Fear God and do not exaggerate this matter. They say, "Othman, the burner of the Qur'an!" By God, he only burned these things before our eyes. We are the Companions of Mohammed, upon whom be peace." Ali later said, "If I were ruler, I would have done the same as Othman did."

Othman did not depart from the path of his predecessors because he merely wanted to be different. He did this because his times were different from the times of Abu Bakr and Omar. When discord and rebellion among the Muslims seemed imminent, Othman moved to collect the Qur'an and rally the Muslims around it. Thus, the ruling

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134. al-Bukhârî, VI, (66/3), 98-9.

135. al-Qurtûbî, *al-Jâmi*ᶜ li-ahkâm al-Qur'an, I, 44-5.

136. ibid.

about the recording of the Qur'an changed with the change of time and situation.

Ibn Abbas' Ruling about the Murderer's Repentance

Ibn Abi Shayba related that a man came to Ibn Abbas and said, "Is there any repentance possible for someone who killed a believer?" His answer was, "No, to the fire of Hell!" Those who were sitting with him said, "What is this ruling, what is the matter with you today?" He said, "I thought he was angry, intending to kill a believer." They sent someone after the man, who found him trying to do just that.[137]

Ibn Abbas saw this man was angry and intended to kill someone. He only wanted Ibn Abbas to give him the chance to do this. Ibn Abbas blocked his way by telling him he could not repent. Had he seen in his eyes an image of a man deploring what he had done, he would have opened the door of hope for him.

According to Sa'id Ibn Mansoor, when scholars were asked about murder, they usually said no repentance would be possible, but when asked about someone who had already killed they said he should repent. Many jurists followed Ibn Abbas. They were as lenient as possible with those who had already committed some crime, yet were very stern with those had not yet committed any offense. They took the same approach with men who swore, "If I do not do such-and-such, I will divorce my wife," and then broke their oaths, even though some early jurists considered this type of divorce invalid.

Change of Ruling in the Early Years of Islam

The early years of Islam give us many examples of changes in rulings. When he was governor of Madina, Omar ibn Abdul Aziz used to accept a single witness and an oath, in cases brought to him. Later, when he went to Syria, he did not accept less than two witnesses because he thought the people there were less reliable than those in Madina. The same applies to Abu Hanifa, who accepted the testimony of a single witness of proven good character. His companions, Abu

137. Ibn Hajr, *Talkhis al-hibbir*, IV, 187.

Yusuf and Mohammed suspended this to prevent people from lying.[138]

The Hanafi jurists explain the different policies of the Imam and his two companions and say that times were different and that both opinions were correct. Later Hanafi jurists also acted differently from their Imams. There are many cases like this, and changes are usually explained in terms of differences of time and situation. Ibn Abidin wrote in his famous epistle *Nashr al-urf*,

> Many rulings may change over time according to the customs of a people with the emergence of a necessity, or because of a change for the worse among the people themselves. If rulings become rigid, people may face difficulties, and the Sharia's principle of making things easy and avoiding harm will be contradicted. That is why we sometimes see scholars of a particular school depart from their Imam's opinion. He based his ruling on the needs of his own time. They may argue that, if the Imam knew their situation, he would say what they said, drawing on the principles of his own school.[139]

Al-Qarafi said a ruling founded upon a habit that changed, or upon a custom that no longer existed must be changed. Al-Qairawani (d. 386/966), gives us a good example of this in an important book on Maliki jurisprudence, *al-Risâla*.[140] He said that when a wall of his house collapsed, he brought a dog and tethered it to the wall to keep burglars away. Some people told him that Malik would not approve of this. He said, "If Malik were here today, he would use a ravenous lion." We can find examples of this in every school, which provides further evidence of the flexibility God has built into His Sharia, which is suitable for every time and place.

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138. ʿAlî Hasab Allâh, *Usûl al-tashrîʿ al-islâmî*, (Cairo: Dâr al-Fikr al-ʿArabî, 1982), 84-5.

139. Ibn ʿAbidîn, *Majmuʿ al-risâ'il*, II, 125.

140. al-Qairawânî, *al-Risâla*, (Cairo: al-Jamalîya, n.d.), II, 414.

5

WHY WE MUST LIVE BY THE SHARIA

Muslims believe that the Sharia must apply to all aspects of life. In the Qur'an, Chapter Two, God says, "Fasting has been written for you" (2:183), and "requital is written for you in the case of those killed" (2:178). In the same chapter, He says, "O you who believe, fear God, and give up whatever usury remains [due to you], if you are believers" (2:278). In the fifth chapter of the Qur'an we read, "You who believe, when you stand up for prayer, wash your faces, and your hands up to the elbows, and wipe heads and [wash] your feet up to the ankles" (5:6), and "As for the male thief and the female thief, cut off their hands" (5:38).

The words "judge between them" in the following verse clearly address Muslims. God says,

> And judge betwen them by what God has sent down, and do not follow their desires, but beware of their seducing you from some part of what God has sent down to you (5:49).

In another place the Qur'an denounces those who do not rule by the revelation and calls them disbelievers, wrongdoers, and truly wicked. While this apparently refers to the People of the Book—the Jews and Christians—who were the recepients of previous revelations, it is really meant as a warning to Muslims, since the Qur'an was in fact revealed to them.[1] While God criticizes the People of the Book for not judging by what was revealed to them, common sense tells us that this criticism is for the guidance of Muslims. It is unreasonable to

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1. The Holy Qur'an 5:44, 45, 47; "Whoever does not judge by what God has sent down, those are disbelievers . . . they are wrongdoers . . . those are truly wicked."

believe that God would describe Jews and Christians as disbelievers, wrongdoers, and truly wicked for abandoning God's Revelation to them, yet leave the Muslims free to desert the Qur'an.

SUITABILITY OF THE SHARIA TO ALL TIMES AND PLACES

Muslims believe that the Sharia is applicable to all times and places. There is firm evidence of this from the Revelation, from history, and from present reality. Many people who oppose the adoption of Islamic law today cannot bear to hear Muslims say this. They usually raise two objections. Firstly, they say human nature changes according to the conditions of people's lives. Secondly, they believe any universally applicable system of law must be impossibly rigid.

Humanity is not constantly changing. Change occurs in life styles, culture, and technology, not in the essence of humanity. If we compare people's lives in the past with their lives today we will see many dramatic changes yet humanity is still essentially the same. Human nature does not change.

Did humanity change with the splitting of the atom? Are people fundamentally different today from a thousand years ago? Perhaps we should ask about the essence of humanity, not about how we live or what we know about the world. From the time of Adam, the father of humanity, man has remained essentially the same, with the same needs and desires. The Qur'an mentions those needs in the story of Adam.

> You will not go hungry or naked there, or thirst or suffer the heat there (20:118-9).

In the Twentieth Century and beyond, we cannot do without the guidance of God that ensures progress, preserves human nature, and protects humanity from the evil of its own making. We will continue to need religion to teach us the secrets of existence. We will need ritual to nurture the soul and link us to God. We will need morals and virtues to mold good character and guide behavior. And we will need realistic laws to establish standards of justice between us. Even as we reach the Moon and Mars, we will still need divine guidance to plan for the future, to shape our relations with one another, to move us to do what is right and to prevent us from doing wrong. Divine guidance commands us to be just, kind hearted, and charitable to friends and

relations. It forbids us indecency and rebelliousness. We will continue to need protection from usury, theft, bribery, fraud, drugs, alcohol, gambling, adultery, and sexual perversion. We will remain in need of strengthening our relationship with God by being steadfast in prayer, in need of fortifying our relationships with people around us by giving charity, and in need of enlarging our understanding of the universe through the pursuit of science. We will remain in need of deterrents to prevent us from from encroaching upon the rights of others and overstepping the limits God has imposed on us. The luxury that surrounds us today, and the possibilities that are open to us, only increase the need for us to be thankful to our Lord and responsible towards His creation.

It is appearance that changes in man, not essence. The Sharia deals with us on an essential basis. It charts the constant features of our lives. Anyone who questions the applicability of the Sharia to all times and places should consider the fact that it is the mind God created for man, and the knowledge He called on people to acquire, that lead us to discover the eternal essence of man; the unchanging human nature that underlies the constantly transforming tapestry of our lives.

PERMANENCE AND CHANGE IN THE SHARIA

The second objection that opponents of the Sharia raise is that the Sharia is static. This charge, too, is rooted in misunderstanding. Islam represents the final revelation to mankind. It is the completion of all that was revealed before. The Sharia accommodates change because God intended it to be permanent. This is part of its miraculous nature and stands as proof of its universality and eternal authority. We can understand permanence and change in the Sharia if we think of its permanent aspects in terms of ends, and of its changeable aspects in terms of means. While the fundamental ends of the law are unchanging, the means for achieving them are not. While religious and moral values do not change, material culture and technology do.

Now, you might ask why Islam was made the way it is. Why did God not make it either absolutely flexible or absolutely rigid? Islam matches human nature to the nature of creation. In the natural world many things never seem to change even over thousands of years. Sky is always sky, and earth is earth. Night follows day in an unending progression. Yet, much of nature is constantly changing. New islands emerge from the sea, old lakes dry up and new rivers cut their courses.

Water floods the land and then recedes. The dead earth comes to life and deserts disappear beneath green meadows. Rich land turns to dust and is picked up and carried away by the wind. While it is true that change is a fact of life, it is also true that it takes place on a foundation of permanence. Some ancient philosophers thought development and change were eternal laws. Others believed that the basis of all existence was permanence. We know that permanence and change work together. It is not surprising that the Sharia combines factors of permanence with factors of change. Thanks to this, the Muslim community can develop while remaining true to its values.

The permanent aspects of the Sharia ensure the survival of the Muslim community. This not only preserves its internal social stability but also protects it from becoming fragmented into smaller potentially rival groups and from assimilation into alien societies. The permanent aspects of the Sharia are a source of continuity and stability in law, and inspire public confidence in government. Under the Sharia, political and social fashions are unable to endanger the public welfare or threaten the economic health of the nation. Change is also essential if Islamic society is to assimilate developments brought by new times and modern lifestyles without sacrificing any of its essential qualities.

Permanence is reflected in the Qur'an and Sunna, in the Sharia, and in Islamic history. Permanence is manifest in its original, conclusive textual sources, the Qur'an and the Sunna.The Qur'an is the original constitution, and the Sunna is the theoretical explanation and practical demonstration of it. These together constitute a flawless, divine source that Muslims must accept, "Say, 'Obey God, and obey the Messenger'" (24:54).

Flexibility is a characteristic of the discretionary sources of law which are derived from the activities of judges and legal scholars. Scholars frequently disagree over the use of these sources. Some tolerate them while others restrict them. Some depend heavily on them while others hardly use them at all. Discretionary sources include among other things consensus, analogy, and consideration of public interests.

Legal tradition, including the rulings of the Companions and precedents established by jurists in the past make up another kind of discretionary source. An examination of the rules of the Sharia will reveal that these fall into two classes. The first is concerned with things

that contribute to the permanence of Islam, while the second is concerned with aspects of flexibility and change. Permanence is characteristic of the five basic beliefs: belief in God, in His Angels, in His Books, in His Apostles, and in the Last Day. These are mentioned in more than one verse in the Qur'an.[2] Permanence is characteristic of the five pillars of Islam: bearing witness that there is no god other than God and that Muhammad is His Messenger, regular performance of the prayer, giving alms to the poor, fasting the month of Ramadan, and performing the Pilgrimage. According to the Prophet these make up the foundation upon which Islam is built.[3] Permanence is characteristic of the prohibition of murder, adultery, usury, bearing false witness, theft, backbiting, and slander. It is characteristic of fundamental virtues like honesty, trustworthiness, patience, sincerity, and modesty. Permanence is a characteristic of law, which regulates marriage, divorce, inheritance, and criminal responsibility for unlawful killing. The Qur'an, the Sunna, and consensus, confirm these things, and they are rock solid. No human authority may change any one of them. According to al-Shatibi "[Such principles] are complete and eternal, they form the basis of human society, and are the guardians of the interests of Creation."[4] The complement of permanence is flexibility. This is generally associated with specific rulings and theoretical law.

DOES THE SHARIA PLACE ANY LIMITATIONS ON MAN?

Those who oppose the adoption of the Sharia as a system of law in modern times deny its eternal and universal validity. We have already discussed the first part of their argument, that human beings are

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2. Qur'an 2:177, "It is not piety for you to turn your faces towards the East and the West. But pious is he who believes in God and the Last Day and the angels and the Book and the Prophets" and 4:136, "He who disbelieves in God, His angels, His Books, His messengers and the Last Day, he certainly has gone far astray."

3. The Prophet said, "Islam is built on five [pillars], to bear witness that there is no god but God and that Muhammad is the Messenger of God, to establish prayer [at its appointed times], to give the poor-due, to perform the Pilgrimage and [to complete] the fast of Ramadan" al-Bukhârî, I, (2/2), 8).

4. al-Shâtibî, *al-Muwâfaqât*.

constantly changing while the Sharia is static. Now let us turn to the second part of their argument.

Opponents of Islamic Law believe it places unreasonable limitations on human beings and condemns them to an unchanging and unchangeable pattern of life. They argue that the Sharia was established within a specific historical context. If it is binding for all time, then the best that people can do with it is to try to re-interpret the textual sources of the law in every age. The general outline for the unfolding of all human activities will remain clearly defined and delimited.

According to this view, the vice-regency of humanity over the earth is contradicted by a rigid and static law. This law directs and controls human development to such an extent that it is necessary for human beings to break away from its constrictive force to fulfil their very function of vice-regency. This argument depends on the previous premise, that human nature is constantly changing.

The first assertion—that the Sharia cannot be eternally and universally valid—must be rejected since it conflicts with the universal consensus of the Muslims. Indeed, this question never even occurred to Muslims. The eternal and universal validity of the Sharia is clear from the Qur'an and Sunna. Evidence for it is so abundant that one hardly need ask about it.

The second assertion—that the Sharia represents an unreasonable limitation—must also be rejected. The obligation to observe the Sharia does not mean that unreasonable limitations have been placed on people. Nor does it mean that the pattern of their lives will be cast forever in stone. This would be true if the Sharia had sought to direct every tiny detail of human activity. The truth reveals that this is not so. The Sharia has left many things to human reason. Many problems require us to think in order to arrive at a solution. These include many ordinary problems of everyday life. The wide margin for error discussed above is meant to encourage Muslims to use their minds. The Sharia gives details of the universal and eternal concerns of all societies. At the same time it speaks generally about issues that vary from place to place and from time to time. The unchangeable things in Sharia law are confined to general principles. These are outlined in the Qur'an and Sunna and concern the basic structures of Islamic society. For example, the Qur'an has spelled out the details of family law to protect the family as a social unit.

Sharia rulings are frequently open to more than one interpretation. These may depend upon the opinions of scholars which in turn rest upon evidence taken from the Qur'an and Sunna. Generally speaking, we may accept or reject the opinions of scholars. The Sharia tolerates a range of opinions and this gives it a creative and dynamic character. Overriding necessity and the need to avoid hardship can also affect rulings. God intends ease for His servants and does not wish to put them into any difficulty. The Sharia is not meant to impose restrictions. Instead, it represents milestones on the road. Its purpose is to guide, not to direct.

Finally, it is not strange in the least that the Sustainer of mankind would establish laws for human guidance. This is not surprising when we consider that human beings are subject to the laws of nature. We must accept these on trust and in good faith. Many things remain in the hand of God. Life and death, sickness and health come from Him. We are subject to periods of wakefulness followed by periods of sleep. Hunger and thirst move us to eat and to drink. Youth glides into maturity and old age. Thus the cycle of our lives inevitably progresses and no one may ever escape from it.

Natural laws govern the whole universe. These laws are strict and immutable and apply from the tiniest atom to the most gigantic galaxies. "You will not find any changing the treatment of God. You will not find any turning the treatment of God" (35:43). But does the establishment of rigorous, permanent, laws mean that limitations are placed on man, or that humanity is sentenced to lifelong invariability simply because he cannot place himself outside their limits? Of course no one, whether a believer or not, would ever suggest such a thing. The existence of natural laws is in the interest of human beings, not God, who is beyond all needs of creation. In these laws is "the work of God Who has perfected everything" (27:88). Why should we accept God's universal laws and decline to accept His Sharia? Why should we accept God's laws in His creation and deny His authority to command? In both cases, He is the All-knowing from whom nothing is hidden, the Wise, the Lasting, the Eternal Guardian who takes no rest.

Contrary to the received truth of modern secular thought, we Muslims believe that the Sharia is the divine expression of perfect wisdom, a mercy from God to his creatures. He imposes this on them to protect

their interests, and has not left them in darkness. Ignorance may lead people astray, and the whims and desires of the human soul may cause us to permit things that are socially and physically destructive. People are prone to the abuse of alcohol and drugs which destroy the mind. Their abuse of sex, through adultery, fornication, and homosexuality, threatens the family and undermines social order. Their abuse of commercial ethics, through usury, gambling, and monopolistic control of essential commodities, breaks the human spirit and crushes it under the oppressive weight of poverty.

The opponents of the Sharia do not revere God as He should be revered. Instead their reverence is directed to human beings who place their authority above that of God. How unfortunate is man, to think that he can get by without Divine Guidance. Can man really manage without the Lord who created him and fashioned him in perfect proportion?

One writer drew an analogy between the law and a father giving advice to his son. He asked whether any father would try to direct every detail of his son's life, and implied that the Sharia was impossibly strict and unyielding. But his analogy is flawed. The Sharia provides general instructions and advice while the legacy of the scholars contains the experience of centuries that we are free to benefit from. Guidance is the character of fatherhood that we should accept open-mindedly and thankfully.

HISTORICAL EXPERIENCE IN THE APPLICATION OF THE SHARIA

The Sharia is not an untried and untested system of law. It has successfully served Muslim societies for centuries and has given them the opportunity to organize just states, establish a culture based upon knowledge and faith, and make Islam the legitimate successor to such ancient civilizations as Persia, Byzantium, and Egypt. Sharia law does not reject modernity, nor does it restrict movement and progress. It is a light to illuminate the path, a spirit to invigorate the heart, and a shield against the base desires of the human soul. A fair treatment of Islamic history will reveal that whenever the Sharia was understood and used, it overcame the divisions of society and provided it with security and a noble purpose. By contrast, whenever the Sharia was ignored Muslim society was humiliated and subjugated by its enemies from both East and West. This is clear from history. While it is

true that there have been Muslim rulers who abused the Divine Law in both theory and practice, this cannot be considered a defect of the Sharia.

Many of those who oppose the modern application of Sharia law assert that it describes an ideal community that never existed outside books. Islam, they say, was applied only for a short time under the Prophet and the Four Caliphs who followed immediately after him. Fuad Zakariyah, a modern commentator who shares these views, argues that the Sharia was never successfully established, and that Muslims have almost always been ruled by tyrants.[5] He supports this statement, saying advocates of Sharia law usually speak about the Rightly Guided Caliphs as model rulers. This, he says, proves that there were no other just rulers in the entire history of Islam. Finally, Zakariyah singles out Omar ibn al-Khattab and says that he was a man of unique genius. In one and a half thousand years, we have not seen another man like him. Dr. Zakariyah's argument involves many fallacies. We will mention only three:

Firstly, Dr. Zakariyah reduces the period of the Rightly Guided Caliphs to the rule of Omar ibn al-Khattab alone. He ignores Abu Bakr's rule, in which huge achievements were made despite his short reign. He also ignores the early years of Othman's rule, a time of both domestic prosperity and foreign expansion. He ignores the achievements of Ali, who made extraordinary progress in government, fiscal policy, and treatment of dissidents, despite serious challenges to his authority and the outbreak of civil war.

Secondly, Dr. Zakariyah believes that Omar was a uniquely gifted ruler. Yet history provides many examples of rulers of similar stature to Omar. Take for example his namesake, Omar ibn Abdul Aziz, who did much to promote Islam, ruled justly in the style of Omar ibn al-Khattab and is even known as the fifth Rightly Guided Caliph. Yazid ibn al-Walid was another remarkable ruler. He took up arms against his cousin al-Walid ibn Yazid because of his excesses.[6] Yazid intended to revive justice and the rule of law. Unfortunately, he died

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5. Fu'âd Zakarîah, *al-Haqîqah wa 'l-waham*, (Dâr al-Fikr: Cairo, 1986); *al-Sahwat al-islâmîya fi mîzân al-ᶜaql*, (Dâr al-Tanwir: Beirut, 1985).

6. Yazid III succeeded al-Walid II in 126/744 and ruled for five months. *OJ*.

six months after he came to power. He and Omar ibn Abdul Aziz were the most just rulers of the Marwanid dynasty. Nuruddin Mahmoud ibn Zangi is also compared to the Rightly Guided Caliphs. He was noble and just, rose against the Crusaders, and was the enemy of iniquity and corruption.[7] Salah al-Din al-Ayubi, whose enemies admired him as much as his supporters did, is another example.[8]

Thirdly, Dr. Zakariyah generalizes too much. He passes a sweeping condemnation on all Muslim rulers throughout the history of Islam, be they Umayyid, Abbasid, Ottoman, or Mamluk. The Iberian-Moroccan dynasties, the Almoravids and the Almohads, are similarly dismissed. So too are the Moguls of India. Were all these rulers unjust and indifferent to the Sharia? Of course not. Many of them were competent and benevolent rulers, particularly in comparison to their contemporaries in other lands.

HISTORY AND TRUTH

Many people who speak about the history of Islam take a negative view of it. They base their opinions on the work of Western scholars— Orientalists who see Islamic culture and history from a Western perspective. From behind a veiled Christian prejudice, these people belittle all things Eastern and especially everything Islamic. In the pursuit of Western interests they have made the objective study of history into an exercise in prejudice and political convenience.

In a conference on Islam and the Orientalists held in India a few years ago, Abul Hassan al-Nadawi described them as muckrakers who scavenge about in garbage and are most attracted to the filthiest things they see. They tirelessly search for weak points which they publish, even if spurious, and exaggerate to support their own pre-determined conclusions. They try to discredit the great leaders of Islam such as Omar ibn Abdul Aziz, whom they accuse of economic and political ignorance, maladministration, and

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7. Ruled Syria from 541-569/1146-1174. *OJ.*

8. Ruled 564-589/1169-1193. He captured Jerusalem from the Franks and founded of the Ayyubid dynasty. *OJ.*

ultimately, of destroying the state. At the same time, they defend such men as the Umayyid despot, al-Hajjaj ibn Yusuf.[9]

Those who believe that the Sharia has not been applied since the very early days of Islam are seriously mistaken. The work of Muslim scholars, who have been busy for hundreds of years writing books about case law, legal theory, and legal practice clearly contradicts it. These books even describe cases brought before allegedly non-existant courts. The idea that the Sharia has never been applied suggests that Muslims have been practicing an empty religion for centuries. Did people not pray and fast and pay zakat? Did they not marry and engage in trade? If it is not the Sharia that regulates these things, then what does? This idea is irrational and can only lead us to disillusionment and despair. If we accept it we become a people without history, with no place in today's world, and with no future.

Mohammed al-Ghazali was recently asked to explain the historical setbacks that have befallen the Islamic community. He said,

> A distinction has to be made between Islam and Islamic thought, between Islam and Islamic government. Islam is an infallible revelation, but Islamic thought is the human effort to understand this revelation. Islamic government is the effort of human beings to implement Islamic thought. Both the understanding and its implementation are fallible. When one person commits a mistake, it will not last long because someone else will soon correct it. When a ruler commits a mistake, it cannot last forever since another ruler will rectify it. The entire community of Muslims—God willing—cannot agree on error.
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> This nation is the bearer of the last revelation. It will be disciplined by fate when it becomes lax or indifferent. Reformers dedicated to the faithful observance of the revelation will always redirect it to the right path. God says, "Of those whom We created there is a community who guide with the Truth and do justice with it" (7:181).

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9. Al-Hajjâj b. Yûsuf b. al-Hakam b. ʿAqîl al-Thaqafî (41-95/661-741), Governor of the Hijaz, Yemen and Yamama under the Umayyad Caliph Abd al-Malik and later governor of Iraq. For an example of a passonate defense of him by an orientalist, see H. Lammens "Hadjdjâdj ibn Yûsuf" in *First Encyclopaedia of Islam 1913-1936* (Brill: 1987), III, 202-204; and also A. Dietrich, *The Encyclopaedia of Islam*, (Brill: 1979), III, 39-43. *OJ.*

> There is nothing strange about finding errors in our cultural and political history. What is strange is that we should try conceal them or fail to overcome them.[10]

CONCLUSION

Today we enjoy the benefits of man's long political experience. Guarantees are now in place to protect the public from tyranny and arbitrary rule. National assemblies keep an eye on government, ensure public accountability, and can even replace errant rulers. Written constitutions define the relationship between the ruler and the ruled, protect civil liberties, and restrict government power. Freedom of the press, freedom to organize political parties, freedom to form professional associations, and the right to strike, give further protection against the abuse of authority.

Muslims should cling stubbornly to the safeguards that have been won through long years of struggle against tyranny. Their preservation should be considered a religious duty that must not be ignored. The Sharia demands justice, consultation, the giving of advice, sincerity in the discharge of responsibility, the enjoining of what is right and the forbidding of what is wrong. These obligations cannot be fully met until an appropriate political protection is secured. This protection is therefore obligatory.

Governments today are able to intervene directly in the lives of the people they govern, to shape and mold the public in terms of ideology, morality and personal behavior. Islamic government in the past was unable to do this since it had no practical means to project itself directly into the public mind. The means to do this now lies primarily with educational establishments and the mass media, which for the first time give the state the power to shape public opinion. Islamic rulers must use these tools in the service of Islam, for it is only for the service of Islam that the state itself exists.

We are not calling for an ideal ruler, for another Abu Bakr, Omar, or Ali. A basic structure of government is required, one founded on the principles of Islam in terms of law, in terms of political orientation, and in terms of practical organization. Its belief, its ideology, its ethics,

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10. Muhammad al-Ghazâlî, *Mi'at su'âl ʿan al-Islâm*, II, 352-4.

and its laws, must depend directly on Islam. The ruler in this system, be he President or Imam, is not a god whose word is law and who may do whatever he pleases. He is a ruler guided by a constitution derived from the Qur'an and Sunna. He is accountable, first before the national assembly, and then before the people. The scholars of Islam, too, bear a responsibility to advise the ruler and the public, and they have a special obligation to enjoin what is right and forbid what is wrong.

We should not be obsessed with finding the perfect leader, sent by God to fill the earth with justice as it is today filled with injustice, or to revive faith for those who have lost their way. I once wrote a long paper on the well-known hadith reported by Abu Da'ud, "At the beginning of each hundred years, God will send to this nation whoever may reform its religion."[11] Many commentators believe the word "whoever"[12] refers to a single person. They began to look for him in every age. He would be a person known for his knowledge, good deeds and kindness, the reformer, the *mujaddid* of the century. While the word "whoever" may refer to either singular or plural, in this hadith, it refers to the plural. Thus the *mujaddid* may be a group of people rather than an individual. Alternately, this could refer to many people appearing in different places at once. Each reformer may be active in his own field, whether it is theoretical or practical. He may work to spread Islam, teach, or fight in the cause of God. Rather than to wait passively for a savior to appear, Muslims must take positive action and ask themselves what each of them can do for Islam and the Muslims.

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11. Abû Dâ'ûd, IV, 109 (no. 4291).

12. The word in the hadith is *man*, a relative pronoun meaning in this context 'who,' 'whoever,' or 'whosoever.' *OJ*.

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IJTIHAD IN THE TWENTIETH CENTURY

We have seen that the Sharia is a universal and eternally valid system of law. If it is suitable for any society in any age, it should, with even greater reason, be applied to our own times and in Islamic countries in particular. There is no system of law that is better suited to these countries than the Sharia. People may ask how the Sharia can be made to work today, since the world has changed so radically. Almost every aspect of public and private life has been transformed during the last century. Political authority is more widely distributed: most governments include some type of public representation and the absolute authority of rulers no longer goes unchallenged. People now have fundamental human and civil rights, and there is a new relationship between the citizen and the state. Problems of economic development also pose significant legal difficulties, especially with respect to banking, insurance, emigration, and international trade. Science and technology continue to transform our lives. Social life has also changed and women now form a significant part of the labor force in many countries. Finally, mass communications have reduced physical and psychological distances between countries.

These are only a few of the changes we have seen in modern times. The question before us is how are we to confront the new world with an "old law"? How can old solutions fit new problems? As we have seen, the Sharia can cope with change and adapt itself to new conditions and environments. But before the Sharia can work successfully in modern times, certain conditions must be met. A return to Sharia law will require the cooperation and support of everyone. If we really want to go back to the divine law of the One Who created us and Who cares for us, we can succeed. If we make

a serious effort to understand the law, we can make it work for us today.

THE REVIVAL OF JURISTIC REASONING

The first and most important condition for the successful reestablishment of the Sharia is to reopen the door to ijtihad and to revive the legal creativity of former times. The Prophet used ijtihad himself, and no one has the authority to deny our right to use it also. Secondly, we must abandon the misplaced loyalty to a single school of jurisprudence. There is no evidence, either from the Qur'an or the Sunna, that we must follow any particular school of jurisprudence or group of scholars. On the contrary, the Imams themselves said that their opinions could be accepted or rejected.

When the Abbasid Caliph al-Mansur asked Imam Malik to write a legal manual for general use, he said it should take a middle path between the liberality of Ibn Abbas and the strictness of Omar. Malik called his book *al-Muwatta.* When the Caliph said he would impose it on the Muslims all over the world Malik objected. He told al-Mansur not to do it because people previously heard things being said, and each group took what they heard first. "Let the people alone," Malik said, "to continue with what they have chosen for themselves." In another narration he said, "The Companions went to different countries, and in every place people have a certain understanding and a certain knowledge. If you force them to follow a single view, the result will be chaos." Al-Mansur relented.[1]

Imam Malik did not believe he was the only person with the right to have a legal opinion, and he did not believe that his ideas were truth manifest. Malik did not want people to be committed to a single view— especially not his own—since any opinion can be wrong. Many different problems had already come up, and there were many different approaches to law. This was true even in the age of the

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1. Abdullah b.Muhammad al-Mansur, Abbasid Caliph. Ruled 136-158/754-775; al-Sha'rani, *al-Mizan,* I, 30. Another version of the story says that this happened with Haroun al-Rashid. It may have been that both Caliphs proposed this at different times. Haroun b. Muhammad al-Mahdi al-Rashid ruled from 170-193/786-809. Imam Malik died in 179/794. Al-Tabari mentions both Caliphs in his account. See *Tarikh al-rusul wal muluk,* ed. M. J. De Goeje, (Leiden: Brill 1964), III, 2519-20. *OJ.*

Companions. There were, however, great scholars around whom other scholars gathered and upon whom the people of a particular place came to depend. In conditions of relative isolation, local traditions of jurisprudence multiplied and different styles of jurisprudence developed. We can be sure that Malik would not be disturbed to know that we have passed over his opinion in favor of someone else's. Similarly, the other Imams would not object if sound reasoning leads us to contradict one of their decisions. None of them has claimed to be infallible.

Malik said, "Anyone's words may be taken or left except those of the Prophet, upon whom be peace." He also said, "Nothing will work with the last of this nation except that which worked with the first of them." We know that "the first of this nation" did not imitate; its scholars paid particular attention to the Qur'an and the Sunna and stuck closely to them. Ordinary people used to ask people of knowledge about whatever they did not understand, but they did not express their loyalty to the views of any particular scholar. If any of the Imams of that period could be asked about the problems of our day, they would surely change their views about many things. Perhaps their opinions depended originally upon factors that are no longer relevant. Perhaps evidence that is common knowledge today was not known to them then. Or, perhaps positions that they thought were weakly supported have now been proved stronger.

WHAT DO WE EXPECT FROM JURISTS TODAY?

When considering the way forward some people take an extreme position and say Muslims should abandon their legal heritage. They suggest a simple return to the Sharia and believe that historical jurisprudence and its various schools of thought resemble a coat that has been tailored to suit a particular individual: the Sharia itself is merely the fabric from which any garment may be made. They should make a new coat—or law—out of the raw material of the Sharia. This is better than altering old and worn out clothes to fit a new generation. Such opinions are uninformed, unhelpful, and unworkable.

Over time, knowledge grows and moves to higher levels of perfection. Each generation contributes to a common heritage and builds upon what was left behind by those who came before. This might take the shape of a refinement, renovation, or correction, and applies to all types of knowledge. The same logic, for example, could never be

applied to the explanation of the Qur'an. It is unacceptable for anyone to do this without considering the opinions of past generations about its meaning. No one should produce a new interpretation based on a bare text. All attempts to do this must lead to failure.

To revive juristic reasoning does not mean that Muslims must deny their legal heritage. There are, however, several points that require further explanation. First, Muslims must have a broad picture of the knowledge of earlier generations. They should take special note of the ideas and legal methods of the Companions and the early generations of the Muslims. Then they will be in a position to know how this knowledge can be applied to their problems today and how it can be used to achieve the goals of the Sharia. Second, they should return to the sources, to the solid evidence of the Qur'an and Sunna, according to their traditional understanding of them. Third, they should renew their efforts to confront issues and situations that jurists of the past did not have the opportunity to address, and to produce suitable rulings on them.

SELECTING FROM THE LEGAL HERITAGE

When I say Muslims should review their legal heritage critically and choose from it the things that will be useful to them today, I do not mean that they should make a random choice, or let themselves be swayed by public opinion. They must not select whatever is easiest, without regard to its correctness or the strength of its evidence. They should not simply pick and choose from past rulings in order to apologize for our present situation. It was this type of selectivity that originally led to the abandonment of Sharia law throughout the Muslim world. Not all of the opinions of past jurists are of the same calibre. Rulings may be textual, depend on consensus, or result from the use of analogies, consideration of public interests, local customs, or other subsidiary or subjective sources of legislation. The legal theory that has been passed down by earlier generations should now be re-examined. The views of scholars of the past should be assessed impartially in the light of the Qur'an.

EXERCISING DISCRETION ON NEW ISSUES

It is the common obligation of the community to approach the issues of our times from the perspective of what Muslims already know about the Sharia. In this way, they can use the Qur'an and Sunna to

discover solutions to the problems they face. Many things have changed dramatically in modern times. These changes have lead to the emergence of new difficulties and challenges for jurists. There is no way for Muslims to meet these challenges except by exercising their reasoning to discover new solutions.

Ijtihad

Juristic reasoning, or ijtihad, is subject to a number of controls or conditions. We will now consider the most important of these.

First, while any ruling based on the subjective opinions of jurists may be reviewed and ultimately changed. Rulings based on solid objective evidence are excluded from this process. Anything that is established by the Qur'an, like the obligation to fast in Ramadan, prohibitions of alcohol, pork and interest, or the laws of inheritance, cannot be changed. These rulings are directly supported by the Qur'an and Sunna. Muslims have unanimously agreed upon them and they are universal features of Islamic societies all over the world. These are the things that make Muslims into a single cultural entity, known in Arabic as the *Ummah*.

Second, things that have never been challenged before must not be questioned. Neither should we listen to people who want us to believe that nothing is clear in religion and who say that everything is really only a matter of informed opinion.

Third, the organization and classification of specific rulings must remain as they have been passed down to Muslims today. Rulings established by the Qur'an and the confirmed teachings of the Prophet cannot be reclassified as subjective rulings. Likewise, rulings based on human reasoning cannot be raised above this level. This has happened before when people tried to close discussion of a problem by asserting that a consensus had previously been reached. A legal consensus, though formally valid, is not the same as universal agreement. This assertion should not be used to excuse ourselves from trying to find a real solution. Imam Ahmad is reported to have said that whoever claims a consensus has been reached is exaggerating since no one could know everyone's opinion.

Forth, the importance of "modernity" should not be over estimated. Many aspects of contemporary life are the products of a non-Muslim society and have nothing to do with Islamic belief, law, or ethics. Many

things were imposed upon the Muslims, whether they liked it or not, at a time of collective weakness. Modern "Muslim" societies often owe much to determined outside forces that they were unable to overcome. This is a world inherited from our fathers.

Muslims should not justify the status-quo by forcing texts to support it, nor should they engage in a creative jurisprudence to turn black into white. God wants Muslims to be witnesses to all nations, not to submit themselves willingly to other people. We must not disregard our unique identity and follow slavishly behind whoever may have come before.

Fifth, Muslims must not be obsessed with resisting everything new, nor should they crave everything foreign, however useful it might seem to be. They must discriminate between what is appropriate for them and what is not, between what should be encouraged and what should be discouraged. Muslims should know when to be firm and when to be flexible. To do this, they must be able to tell the difference between original sources and subjective arguments, between the general and the particular, between ends and means. With the former, they should be unyielding, while with the latter they should be silk-soft. As Muhammad Iqbal said, Muslims should embrace anything new that is beneficial and preserve any thing old that is useful.[2]

Sixth, to successfully revive ijtihad, Muslims should expect to make mistakes. They should forgive scholars when they err and not accuse them of disbelief or apostasy. Several conditions must be met before a person is qualified to exercise ijtihad. For example, a scholar must first acquire a standard foundation of knowledge. This foundation is described in most books of law. It is important to recognize that not just anyone who has worked in law, written on this subject, or memorized hadiths, is qualified to do this. There are people who attempt to pass rulings but do not have even the slightest grasp of the Qur'an and Sunna. Some are completely ignorant of the principles of jurisprudence, and use methods that are anything but straightforward. Such people are a threat to the sanctity of Islam and to the honor of the Sharia. Their opinions should be rejected out of hand. Many

2. Muhammad Iqbal, Urdu poet and thinker, author of *The Reconstruction of Religious Thought in Islam*, (Ashraf: Lahore).

people try to gain some advantage in this way, to achieve social status or worldly benefit, or merely to deceive others. Some use the Sharia as a tool to support a despotic ruler, or to justify behavior that is really inexcusable. Some have even used the Sharia to promote an alien ideology.

Then there are the apologists who try to excuse degeneracy and the perversion of truth, and conjure up evidence from religion to support a twisted reality. New religious judgements appear and turn concrete evidence on its head. Astonishing rulings achieve the impossible, seem to change lead into gold, and the forbidden is magically permitted. An example of this is the modern controversy over bank interest, or *riba*. Here we have a tortured attempt to reconcile faith with disbelief. Mahmoud Shaltut brings up the subject of apologetics and describes some modern attempts to explain away the Qur'an's prohibition of interest:

> Some people say the Qur'an only forbids excessive rates of interest, and quote the words "doubling and redoubling" (3:130) to support their premise. According to them, interest is permissible so long as it is not "doubling and redoubling!" This argument is baseless, for God—to Whom be ascribed perfection and majesty—said "doubling and redoubling" to reprimand people for what they were doing, just as he reprimanded those who prostituted their slaves, and said, "And do not force your slaves into prostitution if they want to keep chaste, so that you may seek the offering of the Life of This World" (24:33). This does not mean that a person may prostitute his slave so long as she does not object. It means that God has denounced the practice of prostituting slaves and has forbidden it. The same applies to interest.

Others argue that a certain "legal" level of interest is necessary to protect lenders from bad debts. They do not accept that this could be damaging or unfair to anyone but see it as useful and beneficial to commerce. Still others argue that there is no difference between a kind of purchase by installments which the Sharia allows, called *salam*, and interest. They base their claim on the fact that both depend upon timed repayments.

There are those who believe interest is necessary for the Muslims and say that since the economic well-being of the country is linked to an economic system based on it, we must either accept interest or face economic chaos. They say this is a case where something that is

forbidden becomes permitted because of necessity. This is a silly argument since the welfare of the community cannot depend on something that is forbidden.[3]

Apology is not confined to those who trade their faith for comfort in the world, or who exchange God for Pharaoh. Apology also appears among people who sincerely want to help, who want to relieve hardship, and defend religion from the accusations of rigidity, backwardness and opposition to the modern world. Nevertheless, the spirit of apology is defeatist. Apologists often think only in terms of what exists now and do not imagine what could or should have existed. This is a serious error and a major disservice to truth.

Return to Islam as a Whole

The Sharia cannot be applied successfully in modern times without a return to ijtihad. While the Sharia has the theoretical potential to cope with the problems of development there are several issues that must be resolved before it will be able provide a viable framework for a just and prosperous society.

Islam must be taken in its entirety: the teachings of Islam must be applied to all aspects of life and to the organization of all social institutions. It is not acceptable for the courts to use parts of the Sharia and ignore others. Neither is it acceptable to impose Islamic Law in the courts and continue to permit educational and cultural instutions and the media to promote non-Islamic values and ideologies. The teachings of Islam describe a comprehensive system, each part of which supports the other. To take some parts of the Sharia and leave the others seriously undermines the effectiveness of anything taken from it. For example, sexual relations outside marriage are prohibited in any Islamic society. For this prohibition to be effective we must encourage people to get married and make this as easy as possible for them. If the average amount paid by young men to their wives is lowered, housing is made more readily available, young people are not expected to buy expensive furniture, and less money is spent on wedding parties, then people would be greatly helped towards mar-

3. Muhammad Shaltût, *Tafsîr al-Qur'ân al-karîm*, 148-152. See also Muhammad Abû Zahra, *Fawâ'id al-bunûk hiya al-riba al-harâm*.

riage. If marriage becomes a real possibility, if minimum standards of dress are established in public, if sexual titillation in the media is abolished, and if pornography is supressed, then the Sharia punishments for sexual offenses will become more relevant. It is not easy to understand the justice of these punishments when marriage is an impossibility, when society encourages sexual license and glorifies rebellion, and when people can easily find opportunities for illicit sex. Here, punishment may not even represent a deterrent.

The same thing applies to theft. According to the logic of Islamic justice, it is not feasible to execute God's command to punish the thief while we ignore His command to pay zakat and refuse to address problems of social justice and poverty. A single verse in the Qur'an requires the amputation the thief's hand, but there are dozens of verses that command Muslims to give charity and to spend our money in the cause of God. God calls us to feed the poor and warns us against hoarding, fraud, taking and paying interest, and gambling. He requires justice and solidarity from Muslims so that no one in any Muslim society will be forced to steal. When Muslims apply the Sharia comprehensively, teach the illiterate to read, feed the hungry, transform insecurity into safety, and abolish poverty, then the thief will have no excuse and those who hope to profit unjustly at the expense of others will be certain of punishment.

The Sharia is an indivisible whole. We must be absolutely certain about this. The Sharia is Islam, its beliefs, its rites, its ideals, its values, its ethics, and its laws. Taken together, these are the things that make up Muslim society. Legislation is only part of the picture. No one should ever believe that an ideal Islamic society can be established by decree. Laws alone do not make a nation. They must have the full support of the people, intellectually and morally, so that they will be able to live by them. The Qur'an says, "In truth God does not change the condition of a people until they change what is in themselves" (13:11). Such a personality will be totally guided by Islam.

We should work to raise a generation of Muslims who will be able to bear the message of Islam with conviction and sincerity. This generation will play a leading role in the resurrection of Muslim society. To build this new generation, Muslims must insist upon Islam as a complete idea and abandon partial solutions and self-imposed restrictions that only take us further from our goal.

The Muslim community can only be liberated by a comprehensive intellectual, and psychological transformation. Muslims must return to the reality of their own long forgotten selves.

Worship is related to belief, belief acts upon morality, morality leads to law, and law is the source of the state. All these things are interconnected. Muslims must have a wider vision of Islamic law in the modern world if they want to lead the ideal life God has commanded. The Qur'an warned us not to be deceived about this:

> And judge between them by what God has sent down, and do not follow their desires, but beware of their seducing you from some part of what God has sent down to you (5:49).

Once, a group of Jews offered to embrace Islam if they could keep some of their old beliefs and traditions, but God revealed a sign and insisted that acceptance of Islam must be total and unconditional.

> You who believe! come one and all into peace, and do not follow in the footsteps of Satan. It is he who is an open enemy to you (2:208).

Overcoming the Present

Before Muslims can reestablish the Sharia, they must somehow overcome the reality of Muslim societies today. Many of these societies are the products of colonialism. Islamic values and traditions were forcibly removed by an aggressive outside force whose goal—the subjugation of the Muslims—could only be achieved by the emasculation of Islam. Much of what makes up everyday life in the Muslim world today, its economic and social institutions, dominant political philosophies, and even popular fashions, work against the goals of Islamic society and blatantly violate the Sharia. For example, bank interest is permitted to dominate all kinds of economic activity, alcohol abuse and the illegal trade in it is tolerated, gambling and pornography are permitted, and inappropriate standards of dress are regarded as acceptable in public. While government institutions exist to impose various levels of control on the mass media, including television and radio, a popular culture of songs, TV series, and films continues to encourage immoral and anti-social behavior. In addition to this, Muslims live under an imported legal system, founded in an alien religious and cultural tradition. This was imposed, not chosen, and affects all aspects of social and political life in the Muslim world.

This is the bleak reality of our situation, but it is not divinely ordained. It is only a symptom of our continuing weakness and lack of resolve, and the inevitable result of a long history of colonialism in which no effort was spared in the achievement of the invaders' goals. What made colonialism even more successful was its ability to represent itself as powerful and successful at a time when the Muslims were weak. Ibn Khaldun pointed out how the conquered are always fond of imitating the conqueror. Because of this, Western leaders did not find much difficulty in imposing whatever they liked on the Islamic countries they came to rule. Muslims were ready to be conquered even before the final defeat.

If this willingness to be dominated no longer exists and Muslims decide to go back to the "source" and purify themselves from the intellectual, psychological, and material stains of colonialism, they will at least know where the road ahead lies. They created this situation and they can change it.

Muslims should not believe this situation is predetermined or unchangeable. They should not believe there is no option to submission, or that legality and public interest lie in making things easier rather than making things better. They are responsible for their situation and they must change this when they can. To do this, Muslims must start by changing themselves, their thinking, their orientation, and their behavior.

The function of religion is to set a supreme example, not to justify present reality. Religion should inspire people to lead, not to follow along behind others. Modernity does not mean, as many people think, that religion should no longer lead. To accept this would only result in disorientation and confusion, since all normal points of reference will be lost and balance, stability, and sense of direction would then be impossible to maintain. It is the duty of Muslims to lift reality up to the horizons of the Sharia. They must not try to pull the Sharia down into the abyss of reality. It is the duty of Muslims to live by the law of God. Divine law must be allowed to shape, nurture, and transform mankind. The Sharia is the word of God, and the word of God is exalted to the heights.

APPENDIX ONE

THE CODIFICATION OF THE SHARIA

Many modern commentators believe that one of the major obstacles preventing the use of Sharia law in modern times is its lack of codification. By this they mean that Sharia rulings should be drafted into orderly, numbered andorganized like modern laws into various categories—civil, criminal, and administrative. This would make the law easier to use and to refer to when passing judgements.

The Ottoman State Committee for Legal Reform

Sensing the importance of this matter, the rulers of the Ottoman Empire set up a committee to draft a new civil code at the turn of the century. Since the Hanafi school of law was the official interpretation of the Sharia in force within the Ottoman Empire, the new code was based on Hanafi jurisprudence. This was finalized in 1896. The Committee based its work upon the common Hanifi books of law. When Abu Hanifa and one of his companions differed on any particular subject, the view that was most compatible with the needs of modern life and the welfare of the community was adopted. For example, they chose the view of Abu Hanifa's two principle companions, Abu Yusuf and Muhammad, over the Imam's own opinion when they considered the type of limitations that could be placed on the mentally deficient. Likewise, they adopted Abu Yusuf's view about contracts for manufacture.[1]

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1. The Committee mentions in its report why it was inclined to favor the view of Abu Yusuf in this matter. They said, "According to *al-Imam al-'Azam* (Abu Hanifa), a contracting party has the right to revoke a contract for manufacture unilaterally. Abu Yusuf, however, says that since a contracting party would have agreed to the terms of a contract at the time of its signing, he has no right to revoke this contract unilaterally. In our times, manufacturers are engaged in the building of ships, the smelting of ore for cannon, and the provision of diverse kinds of goods. As a result of this, manufacturing has become an activity of considerable

The Committee rarely adopted non-Hanafi views. However, they sometimes took the views of later Hanafi scholars, even if these contradicted the accepted Hanafi position. Sobhi Mahmasani, addressing the work of the Committee, says

> [It] performed a great service to the legal and judicial professions. Previously, information on any given question lay scattered throughout the many books of legal theory, case law, and pronouncements of jurists. The Committee made the legal rulings of the Sharia clear and consistent. Judges and lawyers were no longer required to make a great effort to understand and use them. While we were previously occupied with the tracing of annotations and footnotes in various editions of law books, the Committee gathered them all into one place, explained the meaning of many issues, laid out their sources and clarified the evidence to support its conclusions.[2]

Critics of the Committee's work compared their results to European civil law and objected on several counts. First, the proposed civil code did not include laws relating to personal civil status—laws governing marriage, divorce, maintenance and paternity, guardianship, inheritance and so forth, despite their importance to Sharia law and in daily life. Second, the proposed civil code had no general theory of contracts, even though we find the principles of offer and acceptance mentioned in the section on sales in all law books. Third, most legislation on civil offenses was scattered through the proposed code in subsections relating to such things as robbery and malicious damage. Finally, the Committee imposed conditions on some types of contracts that unnecessarily restricted the rights of contracting parties and failed to take into consideration the solutions to some of these problems developed by non-Hanafi jurists.

THE ISLAMIC RESEARCH INSTITUTE, CAIRO

A similar attempt to reform Sharia law was made by the "Islamic Research Institute" of al-Azhar University, in Egypt. As a first step

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importance. Therefore, were contracting parties free to sign contracts and later reverse their commitments, gross infractions to public interest would possibly ensue." See Muhammad Abdul Jawad, *Milkiyat al-arâdhi fi-l' Islâm*, (al-ᶜAlamîyah Press:1972), 14fn.

2. Subhî Mahmasânî, *Falsafat al-tashriᶜ al-Islâmî*, (Beirut: Dâr al-ᶜIlm, 1980), 97-8.

toward a comprehensive review of the law, al-Azhar set up several committees to organize the rulings of each of the four schools of jurisprudence separately and prepared a draft proposal covering the regulation of sales in each of the four legal traditions. But al-Azhar, anxious to see something done as soon as possible, completed its work too hastily and did not give adequate attention to analysis and criticism, nor did it take sufficient account of legal practice. It was as if they believed the Sharia could be applied easily, if only its rulings were arranged in a series of orderly, numbered articles!

One of the fundamental errors of this project was its insistence on considering all four schools of jurisprudence separately. Another weakness was its tendency to opt for the most common view among a given group of scholars. Despite the belief of some members of the council that the Sharia should, above all, be forged into a single code of law based upon the work of all Islamic scholars, the view that distinctions should be maintained between schools of jurisprudence prevailed. This decision was based on the belief that differences of opinion among scholars constitute an obstacle that can neither be ignored nor overcome. This was unfortunate since it failed to acknowledge the fact that God has not required any one to commit himself unquestioningly to the views of any human being. This kind of commitment is appropriate only to the Qur'an and the Sunna of the Prophet, peace be upon him. As Imam Malik pointed out, the views of any scholar may be accepted or rejected.

If we could ask any of the classical scholars about modern problems, they would most likely change a great deal of what they used to say. There would be nothing surprising about this since they reversed many of their own opinions themselves because of a change of conditions, a change of time, a change of custom, or a change of situation. This is why accounts of their sayings varied and sometimes seem to contradict one another.

It is not acceptable to stick rigidly to a single view while the world around us is constantly changing. Such rigidity is neither in the interest of the Sharia nor of Islamic jurisprudence. It was just such misplaced loyalty, just such a refusal to accept the views of anyone who does not follow one's own school of jurisprudence, that led to the failure of the Muslims to codify the Sharia in the first place. Muslims sacrificed the Sharia in the interest of their schools of jurisprudence and lost both in the process! Scholars must accept the best,

most strongly supported views from any source, so that the law can best respond to the spirit of times and the interests of the people. In this we should be guided by the Qur'an and the Sunna, the general rules of the Sharia, the spirit of Islam, and the footsteps of our pious predecessors, who, in their exercise of discretion and skill in the use of legal method, opted for the easy and avoided the difficult.

Recent Moves toward Legal Reform

Most Islamic countries have witnessed some form of legal reform in the twentieth century. This normally includes attempts to codify parts of the traditional legal system. According to Mustafa al-Zarqa, legal reform became so common in the Ottoman Empire that it is difficult to find any portion of the Sharia that was not modified or revised in some way. Several causes lay behind this:[3]

1. Economic development, both at regional and international levels, brought with it a variety of new institutions and practices, some of which were based on custom while others were borrowed from Europe. Such things as limited public liability, ordering on commission, various types of insurance schemes, and procedures in dealing with contracts were not previously treated by the Sharia.
2. There was a need to regularize some aspects of contract law that conflicted with Hanafi jurisprudence or with other interpretations of the Sharia.
3. A uniform procedure for the registration of real estate was needed, for legal, fiscal, and political reasons, so that land tenure could be brought under government supervision.
4. There was a need to standardize legal sources and procedures to be used at various levels of the judicial system.
5. Economic growth contributed to the growing legal paralysis since later jurists confined themselves to traditional interpretations of theoretical law and were unable to offer solutions to the many new problems development brought. An active, creative jurisprudence was needed to confront the problems of the age.

3. Mustafa al-Zarqa, *al-Madkhal al-Faqhi al-'Am*, I, 212-4.

Apprehensions of Some Scholars about Codification

Some scholars object to the codification of the Sharia. A few of the points they raise follow.

1. Codification means that a judge should abide by one opinion—the one that was chosen by those who codified the law—even though a thorough study of a question may reveal many views that a judge should be free to consider. In so doing, he may find a more suitable and equitable solution to the problem before him. Codification "freezes" the judge and confines him to a few opinions. Jurisprudence, in the old sense, gives him the latitude to choose the right ruling according to the circumstances of the case under consideration. In fact, a judge can exercise his own discretion and even pronounce his own ruling based on the principle sources of the law if necessary. If there is no person qualified to pass such rulings, then someone less qualified may sit to judge cases merely by reference to precedent. This, however, is only admissible under dire necessity, and such a person should at least be able to make an informed decision by referring to case law.
2. Codification is particularly harmful when practical application of some laws reveals serious deficiency or incompatibility. They may be working now, but as situations change they become irrelevant to the needs of the judge.
3. Codification may produce lazy judges who depend on the written law, rather than refer to the sources of jurisprudence and their related evidence for a ruling. This would widen the judge's resourcefulness and keep him invariably linked to jurisprudence and its sources.

Considerations Favoring Codification

While these are all reasonable objections, there are even stronger arguments in favor of codification.

1. Some judges need to be bound and controlled so that they do not pass arbitrary, contradictory, or confusing rulings. Not every judge is able to make correct choices and draw successful con-

clusions. Some of them may be influenced by their emotions, others may judge similar cases differently.

2. If the law is codified, parties to a dispute can have a better idea of what ruling a judge will make. For example, a divorced woman with young children will know whether or not the judge will leave the children in her custody. Without codification she would be unable to anticipate the judge's reaction to her case.
3. Codification of the Sharia does not mean that a judge must depend entirely on reading and memorizing. No judge who respects himself and his profession should settle for this. Every law should have an explanatory note and short or long interpretations that highlight some of its aspects. The Ottoman committee developed several interpretations of the dominant Hanafi school, so we should not worry if judges and lawyers rely on the codified law and leave the original sources aside.
4. No law in the world, however sophisticated it may be, can cover all disputes and have a decisive view on them whenever they are brought to the attention of the judge. So, what happens if the judge could not find a specific ruling in the law to treat the case being handled? The judge should pass a judgment in any case that is brought up to him, and his judgment should be based on acceptable reasoning. He should derive this reasoning from recognized sources. That is why the law itself names the sources the judge should consult when a specific legal text is lacking. Thus, Egyptian law called for referring to custom, the Islamic Sharia, or "natural laws of justice." Naturally, laws derived from the Sharia should contain a provision requiring referral to the sources before a legal ruling on any particular case may be pronounced. Again, we feel confident that judges will not abandon jurisprudence and the sources of the law; nor indeed give up further research into them.
5. Sharia judges have been imitators for many centuries. They have stuck to the prevalent legal traditions in their respective countries and generally exercised only limited discretion, preferring to adopt the most common opinions and local practices of their times. They usually did not allow themselves to apply an opinion that was not supported by the local school of jurisprudence, even if it was more strongly supported by the sources.

The result of this was that judges were not given enough latitude to make the judgments they preferred. They were bound by rulings which never took the shape of a specific law. We should commit ourselves to a law enacted by a team of scholars who are well established authorities of the Sharia, acquainted with the requirements of this age and situation of the people, and aided by strong and trustworthy men of law, administration, and economics.

The Codification We Need

Codification of the Sharia should meet a number of conditions: It should not stick to a single tradition of jurisprudence, nor to a single opinion in that tradition. To do this is to put limits on the law of God, and to place unwarranted restrictions on jurisprudence. The secret of the Sharia's flexibility lies in its wealth of opinions. Whoever wants to select rulings will find a great latitude to do so. If he finds nothing in one tradition, he will find something in the other. A judge, or a ruler, should not be restricted to the four orthodox legal traditions but should choose from any legal tradition and from the opinions and rulings of the Companions and those who came immediately after them. All legal traditions are equal in their relation to the Sharia, so long as they do not contradict the Qur'an and Sunna.

We must make use of this wealth and discover its secrets without being unreasonably loyal to any particular school of jurisprudence. Had the scholars of the Ottoman Empire succeeded in reconciling all significant traditions without being bound to Hanafi jurisprudence alone, then Western laws need not have replaced the Sharia in Islamic countries. This could have been the beginning of a new age in Islamic jurisprudence.

The Ottoman committee itself confirmed some obsolete opinions in the Hanafi tradition, simply because they thought this was in the public interest at the time. In its last days, the Ottoman state was forced to abandon the Hanafi tradition and to consider the opinions of other schools. For example, to free a woman from an abusive husband, they adopted compulsory separation of husband and wife from the Maliki tradition.[4]

Those who define the law should select from all the traditions of Islamic jurisprudence, beginning with the traditions of the Companions and Followers and follow the strongest evidence that is compat-

ible with the objectives of the public interest and the Sharia. We should follow the example of those jurists who gave precedence to a particular opinion because it was "most the suitable in our situation." A central concern of the Sharia is that things should be made easy. That is why we should, when offered two equally valid legal options, choose the easier one, following the example of the Prophet, peace be upon him.

The law should be reviewed periodically in the light of the practice and remarks forwarded by judges, lawyers, and those concerned with the legal affairs. This helps in revising and updating the law. Omar ibn al-Khattab, for example, would pass a ruling and then rule quite differently in a similar case a year later. When asked why, he would answer, "That was according to what we knew then, and this is according to what we know now." Imam al-Shafi'i had two traditions, one in Iraq, called "The Old School," and the other in Egypt, called "The New School." In books of Shafi'i jurisprudence, it is common to read, "In the old school, al-Shafi'i said so and so, and in his new school he said so and so." If legal rulings can change with time, place, situation and custom, then the law can change to reflect this.

Our Duty is to Codify the Law

Today, it is vitally important for us to have a firm grasp of Islamic jurisprudence, its history and methods, and to have a solid understanding of the needs and the problems of our age. Only then will we be able to propose a system of law that conforms to the demands of the Sharia. We must avoid repeating the mistakes committed by the Ottoman State Committee. The successful codification of the Sharia requires a thorough understanding of all major currents of jurisprudence and, with regard to Islamization of non-Sharia systems, an understanding of current international law. The effort will require the unrestricted re-introduction of ijtihad. Finally, a theoretical model of jurisprudence based on the methods of the Companions and their

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4. This approach was adopted by some Companions: the two arbiters have the right to rule for the separation of the husband and the wife, which is mentioned in the verse as, "appoint a referee from his family and a referee from her family" (4:35). There are other rulings concerning such things as abandonment by a spouse and so on.

immediate successors must form the basis of codification. To be able to reform Islamic jurisprudence without having to sacrifice its originality, we will require a generation of scholars who combine detailed knowledge of the Sharia with a firm understanding of modern law.

APPENDIX TWO

THE COLLECTION AND CLASSIFICATION OF HADITH

A hadith, is a record of the sayings or actions of the Prophet Muhammad, upon whom be peace. In addition to hadiths there are also accounts relating to the Prophet's Companions which some scholars call *athar*. This article deals only with hadiths.[1]

Hadiths were collected and written down from the time of the Prophet. Many Companions made their own collections, including Abu Bakr who is said to have written down more than 500 hadiths.[2] The system of giving sources for a hadith account became known as *isnad*, literally meaning "support." Isnads were used in the pre-Islamic period to transmit poetry[3] and were later adopted and refined into a system to verify hadiths. Sometimes the Companions would attend the Prophet's teaching circles in turns and then report to one another what he said. They would then say "the Prophet said so and so" or "the Prophet did so and so." If this was reported by a third party he would also mention the name of the Companion from whom he had heard it.[4]

In order to determine the reliability of a hadith and to classify it according to type, scholars examine its isnad. With time, an independent science of hadith criticism developed. This is known as *'ilm al-jarh wa al-ta'dil* which means "knowledge of invalidating and declaring reliable." Ibn Sirin (d. 110/728) refered to the birth of hadith criticism when he said,

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1. This section has been prepared by the editor and does not appear in the original Arabic version of this book. *OJ.*

2. Muhammad Azmi, *Studies in Early Hadith Literature*, (Indianapolis: 1978),. 34.

3. ibid. 212

4. ibid. 213

(The Companions) did not ask about the isnad, but when the *fitnah* broke out people began to say, "Name us your men." Accounts that were attributable to *Ahl al-Sunna* were accepted and those attributable to the innovators were rejected.[5]

Scholars assess hadiths in several ways. The most important of these concerns reliability. Another important consideration is the number of accounts, *riwayahs*, we have of any one report. A third factor is the earliest confirmed source of an account, which may be attributed directly to the Prophet, to a Companion, or to a member of the next generation of the Muslims after them, known as the *tabi'un*, or followers.

Our first order of classification, then, concerns reliability. Here we have three categories, *sahih* (sound), *hassan* (good), and *da'if* (weak). The first of these, a *sahih* hadith, is a report going back to the Prophet, all the narrators of which were people of outstandingly good character, who had excellent memories, and who reported exactly what they heard without interpolations or omissions. There will be no breaks or gaps in the *isnads* of such a hadith and it will not contradict any stronger reports.[6] The second degree of reliability is known as *hassan* (good). This is an account whose original source is unknown, but whose narrators are all sound, reliable people, none of whom has been accused of falsehood. A *hassan* account is accepted by most scholars and may be used as legal evidence to support a ruling.[7] The last degree of reliability is called *da'if* (weak). This falls short of *sahih* and *hassan* accounts on one or more points. For example, a hadith may be declared weak if one of its narrators is a person of questionable character, had a poor memory, or reported what he heard inaccurately. Alternately, it may contain grammatical mistakes, contradict other reports, or contain mysterious breaks or omissions in its isnad.[8] Finally, we should also mention the *mawdu'* or invented hadith. This is

5. ibid. 213.

6. Muhammad ibn Muhammad Abû Shahbah, *al-Wasît fi ᶜulûm wa mustalah al-hadîth*, (Jeddah, 1403/1983), 225-8, 300.

7. ibid. 265-6.

8. ibid. 272.

a false report about the Prophet, about the Companions or about the first generation of the Muslims to come after them.[9]

Beside assessing reliability, scholars also categorize hadiths in other ways. One of these is by the number of accounts, or *riwayahs*, there are of any single report. Here there are only two categories, *mutawatir*, meaning multiple, and *ahad*, meaning solitary. A *mutawatir* hadith comes from several independent sources. Some scholars insist that there must be at least five of these, others require seven, still others require ten or twelve. Each *mutawatir* account serves to confirm the other, and may be used as proof of their mutual and collective reliability. There are two kinds of *mutawatir* hadith. The first includes hadiths that are identical with one another word for word. Within this group only the *isnads* are different. The second includes hadiths that have the same meaning, but are expressed in slightly different ways. The first of these is called *lafzi*, literal, while the second is called *ma'nawi*, semantic.[10] Hadith accounts that fail to satisfy the conditions of *mutawatir* hadith are always catageorized as *ahad* or solitary accounts. There are three sub-classes of *ahad* hadiths, these are called *masshur* (well known), *'aziz* (rare), and *gharib (unusual)*.[11]

Another way scholars assess hadiths is by the earliest person to whom an account can be attributed. Here we have three categories: *marfu'*, taken up—that is to say to the Prophet—*mauquf* stopped, or attributable to a Companion, and finally, *maqtu'*, cut off, that is to say not attributable to anyone before the first generation of the Muslims.[12]

The best known classical sources for hadith criticism are *'Ulum al-hadith* of Ibn al-Salah (d. 643/1235); *al-Taqrib wa 'l-taysîr* of al-Nawawi (d. 676/1277) and the commentary of the same book *Tadrib al-rawi* by al-Suyuti (d. 911/1505); and *Nukhbat al-fikr* of Ibn Hajar al-'Asqalani (d. 852/1448).

For a detailed introduction in English see Muhammad Azami, *Studies in Hadith Methodology and Literature*, (Indianapolis: 1977) and *Studies in Early Hadith Literature*, (Indianapolis: 1979) by the same author.

9. ibid. 319.
10. ibid. 190.
11. ibid. 198.
12. ibid. 204.

Ahmad von Denffer has prepared two very useful bibliographies, *Hadith: A select and annotated guide to materials in the English language*, (Islamic Foundation, Leicester: 1979) and *Literature on Hadith in European Lanugages, A Bibliography* (Islamic Foundation, Leicester: 1981). Both are now somewhat dated but still useful. A cumulative list of sources may be found in the *Index of Islamic Literature*, published quarterly by the Islamic Foundation and the International Institute of Islamic Thought, Hendon, Virginia, USA.

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Author's Introduction

Praise be to God, and blessings and peace be upon God's Messenger, his Family, Companions, and all who follow his guidance.

The College of Sharia Law and Islamic Studies, University of Qatar, having some thirteen years of practical experience teaching introductory courses in Sharia Law, proposed that a general introduction to Islamic Law be offered to students of other departments. The purpose of this course would be to examine the broad features and general objectives of the Sharia and to outline those qualities that set it apart from the world's other legal systems, particularly those of the Semitic and modern secular traditions. The course would also include a critical assessment of the Sharia's claim to universal and eternal validity, its wide scope of application, and flexibility of interpretation as attested to by revelation, history, practical experience, and the judgment of broad-minded and practical people all over the world.

This book was written for use in such a course. It deals with the effort to apply the Sharia in the contemporary world. The difficulties of doing this are considered together with a number of reasons for the appropriateness of Islamic Law to problems of modern society. The conditions necessary for applying the Sharia in our age are also considered. This is not an introduction to the study of *fiqh* and so the nature and origins of the various currents of opinion, Shafi'i, Hanafi, Maliki and so on, and the rules of jurisprudence, are not a central concern of the book.

It is our hope that this book will contribute to a better understanding of the Sharia as a vibrant and living system of law. A more informed view of the nature and character of Islamic Law is increasingly important to Muslims and non-Muslims alike, especially in a time when more and more people in the Islamic world are calling for its return. May God grant us the wisdom to achieve this goal and guide us to it.

Praise be to God by Whose bounty all righteous deeds are made possible.

Algiers, September 1991

PREFACE

This book is about the Sharia, the Law of Islam, and how that law can come to be cautiously molded by human hands to accommodate society to change. Its author, Dr. Yusuf al-Qaradawi, is a world-class scholar and one of the most outspoken defenders of Islamic law in the Muslim world. A graduate of the world famous al-Azhar University in Cairo, he now teaches at the University of Qatar. This book was originally written for undergraduate students who are not specializing in Islamic studies, and addresses several important points about Sharia law, such as its claim to universal and eternal validity, its scope of application, and its flexibility as a system. The author is keen to disprove the claims of Arab secularists and modernists that the Sharia is a medieval system of law, fundamentally ill suited to modern times and impossible to apply.

Unless otherwise indicated in the notes, English translations of the Holy Qur'an were taken from a draft copy of Dr. Daoud William Peachy's recent revision of Muhammad Marmaduke Pickthall's *Meaning of the Glorious Qur'an.*

Complete sources for hadiths are listed in the notes. Translations of hadiths in the book were based on published translations, details of which may be found in the bibliography.

In order to keep distractions to a minimum, detailed transliteration of Arabic words was confined to the notes and bibliography. The spelling, Qur'an, has been followed throughout. The spellings Makkah and Madinah replace the older forms, Mecca and Medina. Terminal *tah marbouta* has not been represented by an *h*, as is sometimes done, *viz.* Sharia for Shariah and sunna for sunnah.

to it, could not be expected to conduct their political affairs without any reference to their faith. When we consider that it is in fact the Sharia that governs their sleeping, eating and dressing, we see that Islamic Law, though deprived of a political role in the modern world, is still a reality for millions. So long as it is a reality for them, their demands that political leaders take account of it should not surprise us.

The time when religion played a decisive role in Western society and politics is now beyond living memory. Yet, only two hundred years ago religion was still important enough for the framers of the United States Constitution to devote most of the First Amendment to religious freedom. The debate over whether the Constitution protects freedom of religion or freedom from religion might surprise them, just as it surprises many Americans today.

As a Western phenomenon, secularism is naturally colored by the experience of the West. In recent history this has been an experience of breaking bonds: bonds of ignorance, bonds of poverty, and bonds of morality and faith. Not so long ago, Karl Marx could identify religion as one of the greatest social evils facing humanity. What Marx said was nothing new: the struggle between political and religious authority is truly ancient, and has been a salient feature of political life in the Muslim East, as it has in the Christian West, for centuries.

Despite this tension, the disestablishment of religion has never been an option in the Muslim world. Throughout the ages Muslim rulers have attempted to control the *ulema*, the loosely defined class of religious scholars, and to internalize religious institutions. But the scholars have always guarded their independence closely and resisted attempts by political leaders compromise them or misuse their authority. Just as often, scholars have sought to restrain political excesses with appeals to respect and implement the Sharia.

Islam achieves a symbiosis between heaven and earth. Divinely revealed, it is in the world and of it. Muslims see the overthrow of religion as the beginning of the descent into tyranny and oppression, both of which are inevitable results of spiritual confusion and doctrinal chaos.

It is our hope that more complete knowledge of Islam and its law will lead to a deeper understanding our faith: of one of the world's most widespread and most dynamic religions.

May the blessings and peace of Allah be upon our Prophet, Muhammad, and upon his family and companions.

Zaid Abdul Mohsin Al Husain
Secretary General
King Faisal Center for Research
And Islamic Studies, Riyadh
1417/1997

1

THE SHARIA AND ITS SOURCES

The Arabic word *Sharia* means whatever God has established for His worshippers to perform as an act of faith, or whatever He has laid down as a part of religion such as fasting, prayer, pilgrimage, regular charity, and other good deeds. The root of this word originally meant to "explain" or to "clarify" and is related to the word for a place where there is a spring that provides abundant water year round. The word Sharia, and closely related words, occur only five times in the Holy Qur'an. In one place a closely related word is used in the sense of set or determine.

> He has *set* and explained for you some of the religion in which He instructed Noah, what We revealed to you (Muhammad), and in which We instructed Abraham, Moses and Jesus... (42:13).

God uses the same word when He criticizes the idol worshippers for choosing the laws of their religion by themselves and asks rhetorically, "Or do they have partners (of God) who have *set* them something in religion that God did not allow?" (42:21). These verses were both revealed at Makkah.

Sometimes the word *shari'ah* means "path" or "way." It occurs in this sense in the verse "Now have We set you (O Muhammad) on a *clear path* of (Our) command..." (45:18).[1] This verse was revealed at Makkah before any legislation, which is confined to the Madinan

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1. Further explanation is to be found in al-Tabari, Muhammad b. Jarir (d. 380/1000), *Jâmi' al-bayân fi tafsir al-Qur'ân*, IX (Beirut: 1978), 88: "Ibn Abbas said [this] means, 'We have sent you [Muhammad] to guide others to God and to explain His commands to them . . .'; Qatada said the word *sharia* means the obligations Muslims bear, the sanctions that enforce them, the things we are commanded to do, and the things we are commanded to stop doing...; Ibn Zaid once said it means the divine law and then he read [the verse], 'He has set and explained for you some of the religion in which He instructed Noah, what We revealed to you [Muhammad]...' Zaid said Noah was the first of them and Muhammad is the last of them." *O.J.*

verses, was sent down; it contains the only mention of the word *sharî'ah* in the Holy Qur'an.[2]

The Sharia is the totality of firm judgments revealed by God in the Qur'an and Sunna, and whatever is derived from these judgments through jurisprudence.[3] Jurisprudence is the method of discovering detailed legal provisions from specific evidence drawn from the Qur'an and the Sunna. The jurist must exercise reflection and careful thought to solve problems whose solutions are not immediately apparent.[4] While the Sharia is the goal, jurisprudence is the road to it.

A book of jurisprudence is really a collection of legal rulings. These can be divided into two categories. The first of these contains all rulings explicitly spelled out in the Qur'an and the Sunna. While this is the more important category, since it provides the foundation of the Shaṛia, it is the smaller of the two. No one can say that the rulings in this category are not part of the Sharia. The second category consists of rulings that rely exclusively upon the discretion of jurists. This category also includes legal precedents set by jurists using methods like analogy, consideration of public interest, juristic preference, consideration of custom and so on. Since the passing of such rulings is the main activity of jurists, these account for the majority of reported legal rulings.

Writers sometimes disagree about the relationship between the Sharia and Islamic jurisprudence and say that these are two absolutely different things. Their premise that the Sharia is divine and jurisprudence is man-made is mistaken since jurisprudence stands in direct relation to the Sharia and in truth describes it. The Sharia does not exist in a vacuum. Jurisprudence is an important component of it and the tool by which the Sharia deals with new issues using methods that

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2. Compare the Makkan verses above to this verse revealed at Madinah: "For each We have appointed a (*shirᶜa*) divine law and a course (of action)" (5:48). [According to al-Tabarî, X, 384, "The Almighty said in His revelation, 'For each we have appointed a divine law (*shirᶜat*).' The Arabic word *al-shirᶜa* and *al-sharîᶜa* both originally mean a spring, a place where water emerges from the earth and may be had without digging or letting down buckets. For this reason the sources of Islam were called *sharâ'iᶜ, since its people find their source in it." OJ.*]

3. The word *fiqh* also means to deduce the unknown from what is known. This is a more specific term than *ᶜilm*, which means knowledge.

4. al-Jurjânî, ʿAlî b. Muhammad b. ᶜAlî (d. 816/1413), *al-Taᶜârîfât*, ed. ᶜAbd al-Rahmân al-Amîra (Beirut: ᶜÂlam al-Kutub, n.d.), 216.

are compatible with its principles and objectives. Rulings arrived at by the discretion of jurists are part of the Sharia.

To dismiss jurisprudence as the product of imperfect human minds is unacceptable since the logical conclusion of this is the rejection of the Sharia itself. Nevertheless, it is possible to improve the resources of jurisprudence. Some of these improvements have to do with form, such as indexing and codification. Others have to do with substance, such as the revival of juristic discretion or *ijtihad*. Juristic discretion can be a selective process where one legal opinion is preferred to another because of the strength of its evidence, but it can also be used creatively to establish the position of the Sharia on completely new issues.

According to the dictionary, law is "the body of formal or customary rules which a state or community recognizes as binding on its members."[5] This body of rules forms the basis by which judges are guided. The word "law" refers to the rules that men have enacted to govern the community and to regulate personal, national, and international relations. The Sharia is revealed by God but law is enacted by man. Sometimes the word law has the sense of a set of codes that deal with a particular problem such as drug abuse. It can also mean the rules and regulations people use to settle their disputes.

The oldest known set of laws, called the Laws of Hammurabi, was used in Babylon some 4000 years ago.[6] Roman law has had a more profound impact on modern times because of its relationship to Western legal traditions. Western law, in turn, became the basis of legal systems throughout the Islamic world during the colonial era. Roman law had no direct influence on Islamic jurisprudence in classical times.

Abdul Qadir 'Awda, a lawyer who also has experience as a Muslim jurist, explains that law is largely the product of society. It changes and develops with the society it serves. Indeed, society often sets standards to which the law must ultimately conform.The Sharia, on the other hand, is not the product of the Muslim community. It was revealed by Almighty God to His Prophet, Muhammad, upon whom be peace,[7] and came to us in a complete form. Here, it is society that

5. Little *et al.*, *The Shorter Oxford English Dictionary*, (Oxford: 1973), 1185.

6. Hammurabi was a king of Babylon who ruled from 1792 to 1750 BCE. *O.J.*

7. The Prophet's name is usually followed by some form of supplicaiton for him. Readers are reminded to observe this sunna. *OJ.*

must conform to revealed law. The Sharia cannot be changed to follow the fashion of the times or the will of the people. But while it is unchangeable, it is not rigid. Abudl Qadir 'Awda explains,

> The immutability of the Sharia depends upon two characteristics. The first is that its general principles are universally valid. The second is that it is flexible enough to accommodate changing social needs. These are the most important aspects that set it apart from all other systems of law.[8]

The Sharia is meant to be the foundation of a unique Muslim nation, a nation whose mission is to guide humanity. The Sharia cares for the community as well as for the individual and aims to balance their conflicting interests. It is from this perspective alone that we will begin to understand the real meaning of the phrase *Dar al-Islam*, the single and indivisible community of faith whose preservation and defense are the duty of every Muslim. The office of the Caliphate is proof that the Muslims are a single political community. Indeed, one of the definitions of this office is that its holder is the leader of all the Muslims. There can only be one legitimate Caliph. A single community can have but one leader. Obedience is owed to him in all matters sanctioned by the Sharia.

Naturally, the Sharia aims to establish a social order of the highest calibre based upon certain fundamental ideals. These have been outlined in the Qur'an and the Sunna and include justice, brotherhood, solidarity, freedom, and dignity. To illustrate this, we will consider one of these in more detail.

The Qur'an has emphasized that the primary objective of all the Prophets is the establishment of justice on earth. "We sent Our messengers with clear proofs, and sent down with them the Book and the Scales for mankind to stand fairly" (57:25). According to this, the prophets were sent so that men can rule justly. God says, "Say, 'My Lord orders fairness...'" (7:29), and also, "God orders justice..." (16:90).

The justice that the Qur'an commands means being fair to yourself by observing God's limits.

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8. ʿAbd al-Qâdir ʿAwda, *al-Tashrîʿ al-janâ'î al-islâmî muqârinan bil-qanûn al-wadʿî*, (Beirut: Mu'asasah al-Risalâ, 1995), 14-23.

It means being fair to God by worshipping Him, seeking His help and not associating anything with him. It means being fair to others and avoiding hatred and favoritism. It means being fair in word. It means being fair when bearing witness and being fair in judgment. Finally, it means being fair to your family.[9] Justice is due to all people regardless of religion since by its nature justice is absolute and cannot apply differently to different people. The Holy Qur'an tells us,

> God does not forbid you from showing kindness and dealing justly with those who have not fought you about religion and have not driven you out of your homes, for God loves just dealers (60:8).

Justice is a constant principle, regardless of circumstances, even in times of war. God says, "Fight in the way of God against those who fight against you, but do not go beyond the limits. God does not love those who go beyond the limits" (2:190).

Absolute justice is one of God's divine qualities. It is not possible to identify Him with injustice since this is to contradict a quality of divinity. A careful study of the Sharia will reveal that it encourages

9. On being fair to yourself by observing God's limits: "As for whoever steps beyond God's limits, he wrongs his soul" (65:1); On being fair to God: "Don't associate partners with God. Associating partners with God is a great wrong" (31:13); On hatred and favoritism: "Do not let hatred of any people drive you to deal unjustly. Deal justly, that is nearer to fearing God" (5:8), and "You who believe, stand firm in justice as witnesses for God, even if it is against yourselves, parents or relatives..." (4:135); On being fair in word: "If you speak, be just, even if there is a relative..." (4:135); On being fair in witness: "Call to witness two just men among you, and keep your testimony upright for God" (65:2); On being fair in judgement: "God commands you..., if you judge between people, to judge justly' (4:58); The Prophet said, "God will give shade to seven on the Day when there will be no shade but His: (1) a just ruler, (2) a youth who has been brought up in the worship of God, (3) a man whose heart is attached to the mosques, (4) two people who love each other only for God's sake and they meet and part in God's cause only, (5) a man who refuses the call of a charming woman of noble birth for illicit intercourse with her and says, 'I am afraid of God,' (6) a person who gives charitable gifts so secretly that his left hand does not know what his right hand has given, (7) and a person who remembers God in seclusion and his eyes are then flooded with tears." Al-Bukhârî, Muhammad b. Ismâ'îl b. Ibrâhîm b. al-Mughîrah b. Bardizbah, al-Ju'fî, (d. 256/870), *Sahîh*, I (10/36) (Istanbul: Matkabat al-Islâmîyah, 1981), 160; On being fair to your family; "Marry women who seem good to you, two or three or four. And if you fear that you cannot be just then (only) one" (4:3). — The justice commanded here is the apparent justice that human beings can afford, rather than the emotional justice over which no man has a hand. This is what is meant by, "You will not be able to deal equally between (your) wives, however much you so wish. But do not turn altogether away (from one), leaving her hanging. If you do good and fear God, then God is Forgiving, Merciful" (4:129). The justice that is impossible according to the Holy Qur'an is the absolute justice that covers both the known and the unknown. It is prohibited to show an obvious favoritism to one wife while hurting another, though what is unavoidable is tolerated in view of human weakness.

justice in all areas of human endeavor: in trade and exchanges, in marriage and divorce, in public order and policy, in relations between individuals whether within the context of the family, society or political culture, and in relations between sovereign states. It is possible, therefore, to view the concept of justice in the Sharia in terms of three domains: politics, economics, and international affairs.

Political justice means that all people are equal before the law. The Prophet said, "If Fatimah, the daughter of Mohammed, had stolen anything, I would chop off her hand."[10] Economic justice demands distribution of wealth in such a way that it will not be concentrated in only a few hands. The weak should be given precedence over the others in the distribution of natural resources such as oil, gas and so on, "That it may not become a commodity between the rich among you" (59:7). The same principle applies to equal opportunities in education and employment. In international affairs, relations between Islamic and non-Islamic states must be characterized by justice, both in times of peace and in times of war. The Sharia requires respect for treaties, non-belligerence, and the pursuit of peace whenever possible. Islam ensures justice for all, weak and strong alike. The Sharia even supports the unjust, by deterring them from wrongdoing. In a well known hadith, the Prophet said, "Support your brother, just or wronged!" "O Prophet," his Companions said, "we support him if he is wronged, but how do we support him if he is a wrong doer?" The Prophet replied, "By preventing him from doing wrong."[11]

Ibn al-Qaiyim al-Jawziya (d. 751/1350) believed that the Sharia is the highest expression of justice and mercy. Oppression is a deviation from justice, cruelty is an abandonment of mercy, and harm is a failure to defend the interests of people. Oppression, cruelty, and harm have nothing to do with the Sharia.[12]

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10. al-Bukhârî, Muhammad b. Ismâ'il b. Ibrâhîm b. al-Mughîrah b. Bardizbah, al-Ju'fî, (d. 256/870), *Sahîh*, I (64/53) (Istanbul: Maktabat al-Islâmîyah, 1981), 97, henceforth, "al-Bukhârî".

11. al-Bukhârî, III (46/4), 98.

12. Ibn al-Qaiyim, Muhammad b. Abû Bakr, al-Jawzîya, *I'lam al-muwâq'in fî rabb al-'âlamîn*, III (Cairo, n.d.), 3.

The Holy Qur'an

The only source of the Sharia is revelation. This consists of two parts, the Holy Qur'an, the recital of which is an essential part of worship, and the Prophet's Sunna.

God has honored the Muslims with His final revelation to humanity. The Qur'an is the only existing record of divine revelation that is free of distortion and fabrication. Nothing has been added and nothing taken away. Falsehood cannot approach it from any quarter. It is today as it was revealed by God and brought into the heart of Muhammad, who gave it to his Companions, who in turn passed it on to those who came after them, and so on from generation to generation. It remains inscribed upon the hearts of the people and indelibly stamped upon their memories. It is written down and preserved in mosques, schools and homes. Universally recognized as the Glorious and Holy Word of God, the Qur'an is described by God as "a Book whose verses have been perfected and then detailed, from One who is Wise, Well-Aware..." (11:1). The Prophet was told that this is "a Book which We have sent down to you (Muhammad) to bring out man from darkness into light, with the permission of their Lord, to the path of the Mighty, the Praise Worthy" (14:1).

The Miracle of the Qur'an

The Qur'an is the greatest miracle of the Prophet Muhammad, peace be upon him. It is not like the miracles of the previous messengers and prophets. (Moses changed his staff into a snake, and Jesus healed the blind and lepers and raised the dead by the will of God.) These Prophets were sent to guide their people and to prepare the way for the final message sent with the Last of the Prophets. The message of Muhammad is that final message that shall endure until the end of time. God's revelation to Muhammad is a universal message and a mercy to the world. It embraces the life of man in this world and the next. It is the message for the individual and the community. It speaks to the mind and to the heart. It moves the body and the spirit. By the supreme wisdom of God an enduring and eternal miracle bears witness throughout time to the honesty and integrity of the last of His messengers. This revelation is not linked to the material world. It is a recitation of sublime beauty, a fountain of knowledge that will remain forever beyond the ken of any single human being. It continues to

astonish every new generation just as it astonished those who first witnessed it.

This supreme evidence—the Qur'an—is the miracle of eloquence, and eloquence was the highest achievement of the Arabs. They were unable to meet its challenge to come with "the like of it" (52:34) or to "bring ten chapters like it" (11:13) or even to "bring a chapter like it" (10:38). Thus the Arabs themselves confirmed the words of God who said, "If man and the jinn gathered to produce the like of this Qur'an, they could not produce its like even if they helped one another" (17:88).

The subject matter of the Qur'an and its contents could be described as the miracle of progress and development. On this level, at least, the miraculous nature of the Qur'an may be understood by all nations since a knowledge of Arabic is not required to appreciate this aspect of the revelation. Here we see how the Qur'an guides humanity to the pinnacle of success, be it in the purification of the human soul, in the building of the family, in the direction of society and the establishment of the state, or in the setting up of international relations on the most secure basis possible.

Finally, the Qur'an reveals its miraculous character in what could be called the miracle of knowledge. By this we mean the many aspects of the natural world discussed in the Qur'an. These things include the biological processes underlying the creation of man, animals, and plants, and the physical aspects of the creation of the heavens and the earth. In a clear and uncluttered language, the Qur'an makes many scientific assertions that precede discoveries of modern science by many centuries. Of course it would be impossible for any man living so long ago and in such a different world to predict accurately scientific discoveries that would not be made for well over a thousand years.[13]

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13. For a further discussion of the miracle of the Holy Qur'an Muhammad ᶜAbdullah Darāz, *al-Naba' al-'azîm: nazirât jadîdah fî 'l-Qur'ân*, (Kuwait: 1983), Sayed Qutub, *al-Taswîr al-fanî fî 'l-Qur'ân*, (Cario: 1983), and *Mashâhid al-qiyâma fî 'l-Qur'ân*, (Cairo: 1981), same author. For details on the Qur'an's challenge to humanity see Muhammad Rashid Rida, *al-Wahî al-muhammadî: thabût al-nubûwa bi 'l-Qur'ân*, (Cairo: 1933), and Muhammad Abu Zahrah, Shariᶜat al-Islâm dalîl ᶜala innahu min ᶜind Allâh, in *Al-Muslimoon*, (Cairo), no. 1, 1371 h, 30-35.

> But God testifies about what He has sent down to you. He has sent it down with His knowledge, and the angels also testify. And God is best as a witness (4:166).

The Immutability of the Qur'an

The Qur'an is the eternal word of God that will endure until He inherits the earth and all that is in it. It is not the book of a generation or an age, not that of a dynasty or an epoch. It is not a book whose time must naturally end and which will be replaced by another, as God's revelations to our ancestors were replaced by new scriptures. The Qur'an is the eternal message sent to the last of God's messengers. It is the final revelation of God to mankind, revealed in the hour of man's maturity when he would be ready to receive the eternal and universal message. There will be no revelation after this and no messenger will follow Muhammad, by whom God has sealed the line of the Prophets.This is why God has preserved the Qur'an from all distortion and corruption. He has declared this simply and plainly, saying, "It is Us Who have revealed the Reminder and We indeed are the Guardian of it" (15:9). Here God refers to Himself with the plural pronoun "Us." [14]

He lays special stress on this pronoun and also stresses the predicate, "Guardian." It is best simply to have the promise of God, Whose word is truth manifest. What then, when He places so much emphasis on His promise?

The Universality of the Qur'an

God has made the Qur'an a book for all people and all worlds. Its universality is clear in several places. Consider, for example, the verse, "The month of Ramadan in which the Qur'an was sent down as a guide for mankind" (2:185), and also, "This is nothing other than a reminder to all beings" (81:27).

The Qur'an is not a book for a favored race, a favored country, or a favored party. It is not meant only for intellectuals or spiritual leaders,

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14. This is a grammatical, not a natural, plural. Allah sometimes refers to Himself as "Us" in order to emphasize His Omnipotence and Power over creation. Other examples of grammatical plural is the use in French of "vous" (plural "you") as an honorific form of address when speaking to one per son, and the use of "We" in royal decrees when a reigning monarch refers to himself or herself. *OJ.*

not for rulers alone, and not only for the rich. It is for all people and contains all things. God told the Prophet, "And We have sent the Book down to you as an explanation of everything, as a guide, as a mercy and as good news for the submitters (to God as Muslims)" (16:89). The first Caliph, Abu Bakr, said, "Even if a camel's hobble were lost I would probably find it in God's Book."

The Qur'an is not only concerned with theology, belief, and ritual. It does not speak only about virtue and morality, and is not just a book of law. Look, for example, at the following two verses from the Second Chapter of the Qur'an.

> When you have divorced women, and they have reached their terms, then keep them in kindness or let them go in kindness. Do not keep them to their harm and violate (the limits). He who does that has wronged his soul. Do not make a joke of the signs of God (by your behavior), but remember God's favor to you and what He has sent down to you of the Book and of wisdom, with which He warns you. Fear God and know that He is aware of all things. And when you have divorced women and they reach their terms, do not prevent them from marrying their mates if it is agreed between them in kindness. This is to warn him among you who believes in God and the Last Day. That is more virtuous for you, and cleaner. God knows while you do not (2:231-2).

How can we categorize these two verses? They involve family law, moral and religious guidance, and a reminder of God and the Last Day. These verses also emphasize the fact that God knows everything that humans do not.

Part of the comprehensive nature of the Qur'an is that rather than addressing the mind alone, or the heart alone, it addresses the human being as a whole to simultaneously persuade the mind and arouse the heart.

The Qur'an does not address a narrow group of people in order to appeal to a specific intellectual or psychological type to the exclusion of all others, but addresses all people equally. The seeker of material facts will find in the Qur'an what satisfies his curiosity. The Qur'an also commands his attention and requires him to reflect upon and to refute doubt and falsehood.[15] The word for comprehend occurs fifty

15. "Islam speaks to the mind, and does not confine itself merely to feelings and emotions.

eight times in the Qur'an, the word for contemplate seventeen times, and the word for mind sixteen times, not to mention the many verses that include words for perception, consideration, reflection, argument, proof, and reasoning.

The seeker of spiritual truth will find food for the soul, as Moses did in the story of his quest for truth, and of his encounter with the man of whom God said, "Then found they one of Our slaves, to whom We had given mercy from Us and taught knowledge from Us" (18:65).

The Qur'an guides us to a knowledge of morality and the performance of good deeds. According to the Qur'an, one of three imperatives of faith is to "do good so that you may succeed" (22:77). But simply doing good is not enough. Muslims must also call others to do good too. "Let there be among you a group who call for good, and order what is right and forbid what is wrong" (3:104).[16]

Beauty and pleasure also have their place in the Qur'an, which directs our attention to an appreciation of nature, plants, animals, man, and of all creatures.[17] In addition to this, there is the sublime beauty of the Qur'an itself addressing the entire human character.

> Man, what has deceived you about your Lord, the Bountiful, Who created you, then fashioned, then proportioned you... (82:6-8).

Using the mind to see is the conscience's way to the truth, for thinking is the gateway of guidance through which faith is achieved, 'Say [to them, O Muhammad], "I urge you to one thing only, that you stand, for God, by twos and singly, and then reflect."' Comprehensiveness could not have gone any further in religion than addressing man's body and spirit, mind and conscience, all at once without exaggerating or underrating any one of them." ᶜAbbas Muhammad al-ᶜAqâd, *Haqâ'iq al-Islâm wa abâtîl khusûmihi*, (Cairo:1957), 24.

16. See also Muhammad ᶜAbdullah Daraz, *Dustûr al-akhlâq fil Qur'ân*, (Beirut: Mu'ssasah al-Risâla, 1985). Morality and good behaviour take up such a large portion of the Sharia that we can not adequately describe it here.

17. "And We have set constellations of stars in the sky and made it beautiful for viewers" (15:16). Also "And We have indeed beautified the sky of the world with lamps, made them missiles for the devils, and for them prepared the punishment of the Flame" (67:5); "And We have spread out the land, set fixed mountains in it and grown every kind of lovely pair in it" (50:7) and also "[Who has] sent down for you water from the sky, by which We have grown orchards of joy and beauty, whose trees it has not been for you to grow?" (27:60); "And He created livestock, in which you have warm clothing and other uses, some of which you eat, And in which you have beauty when you bring them home and when you take them out to pasture" (16:5-6); "He shaped you and made your shapes lovely..." (64:3); "The work of God who has perfected everything" (27:88).

The Prophet's Sunna

The Sunna is the way or method of the Prophet, upon whom be peace. It includes what he said, what he did, and what he observed others doing and silently approved.[18]

While the Qur'an is the first source of the Sharia, the Sunna is the second. The Sunna provides the theoretical explanation and practical application of the Qur'an. The Qur'an represents the "constitution" that contains the fundamental basis of the Sharia. It is indispensable for regulating Islamic life and for guiding humanity to the right path. The Sunna is the Prophet's way, or method of interpreting this "constitution." It teaches us the difference between what is relative and what is absolute by drawing on practical images from the life of Prophet Muhammad, upon whom be peace. The Qur'an confirms this, saying that the Prophet's mission is to clarify to mankind what has been given in the Qur'an.[19]

Had it not been for the Sunna, many things would have remained hidden from us. The Sunna is a major source of detailed information about the Sharia. The Qur'an commands Muslims to pray, but does not say how, when, how many times a day, or what types of prayers. These matters are fully explained in the Sunna. The Qur'an requires that the poor-tax be paid, but does not give details about how much should be given against what types of property, the minimum amount of property upon which such payments are due, or how much should be given and when. Again, the Sunna provides a detailed explanation. The same is true of fasting and pilgrimage.

Why is it necessary to follow the Sunna?

Some people say the Qur'an is enough for us and that we do not need to follow the Sunna. They say the Qur'an explains everything. They also claim that while God has protected the Qur'an from changes and distortions, the Sunna does not enjoy this same guarantee.

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18. The Prophet's utterances are known as 'hadith'. This is sometimes translated as "Prophetic tradition" or "tradition" and is one of the core terms of Islamic jurisprudence. *OJ.*

19. "And to you, We have sent down the Reminder for you to explain to mankind what has been sent down to them, and so that they may consider..." (16:44), and also, "And We have sent down the Book to you only for you to explain to them what they differed on, and as a guide and a mercy to people who believe" (16:64).

The Qur'an itself contradicts the first notion clearly stating that obedience to Almighty God is obedience to the Prophet, peace be upon him, "Obey God, and obey the Messenger..." (24:54). The Qur'an also says "Whatever the Messenger gives you, take it. And whatever he forbids, stop. And fear God. God is severe in puishment" (59:7). In fact, obedience to the Prophet is part of obedience to God, thus the Qur'an warns against disobeying the Prophet's orders and denies the faith of those who reject his authority.

> Whoever obeys the Messenger obeys God, and whoever turns away—We have not sent you as a keeper over them (4:80). [20]

The Prophet warned us about people who deny the Sunna. In one hadith he said, "I have been sent with the Qur'an and something else like it. There will be people who with bellies full (relaxing) on their beds will say, 'You should just observe the Qur'an. Whatever you find in it that is lawful is permitted, and whatever you find in it that is unlawful is forbidden.' Indeed! But donkey meat is forbidden to you and you may not eat animals with canine teeth."[21] The idea that the Sunna is extra contradicts the universal agreement of the Muslims across the ages, despite differences of doctrine and approach to jurisprudence. Muslims have always referred to the Sunna together with the Qur'an.

As for the argument that God has undertaken to protect the Qur'an but not the Sunna from distortion and corruption, Imam al-Shatibi (d. 790/1388) points out that God's protection of the Qur'an implies the protection of the Sunna, since protection of the thing that is explained (the Qur'an) must depend on the protection of the thing that explains it (the Sunna). The second is necessary for the first. In the darkest hour of every age, God raises up those who defend the Sunna from the distortions of fanatics, the forgeries of plagiarists, and the prophesies of fools.

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20. Also, "No, by your Lord, they will not believe until they make you judge of what is in dispute between them and find within themselves no dislike of what you decide, and submit fully" (4:65).

21. Ahmad b. Hanbal al-Shaibânî (d. 241/855), *al-Musnad*, IV (Beirut: 1983), 131; Abû Dâ'ûd, Sulaymân b. al-Gârûd b. al-Ashʿath al-Azdî al-Sijistânî (d. 275/889), *Sunan Abî Dâ'ûd*, IV (Beirut: Dâr al-Fikr, n.d.), 200 (no. 4604).

Are Isolated Sunna Narrations Legally Binding?

Some of those who try to undermine the Sunna say that only hadith reports that go back to the Prophet via numerous independent narrations, each confirming the other, can be accepted. They reject most hadiths, since these rely on solitary narrations. This is an old issue. Imam al-Shafi'i (d. 204/820) pointed out that in the Prophet's lifetime, a person used to come to him, learn something and then pass this knowledge on to his own people. This knowledge was binding on them, as it was on him. Furthermore, the Prophet used to send some of his companions to different tribes and regions. Abu Musa and Mu'adh were sent to Yemen for example, to spread Islam and teach the people their religion. These people were bound to observe what the Prophet's messengers taught them. They could not claim they needed further confirmation or a second opinion.[22] The Qur'an supports this also. God says for example,

> If a group of every troop of them did not go out, they might instruct themselves in religion, and they might warn their people when they returned to them, and so that perhaps they might take warning. (9:122).

Since any individual may distinguish himself from the rest of the community by study and depth of understanding, people should accept the authority of religious scholars, otherwise they would be of little benefit to their communities. A solitary narration, or *ahad* hadith, commands legal authority.[23]

The Difference between Qur'an and Sunna

The following are the most important differences between the Qur'an and the Sunna.

1. The Qur'an was revealed by Angel Gabriel while the Sunna was established by the Prophet Muhammad, upon whom be peace.

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22. See al-Shâfiʿî, Muhammad b. Idrîs, *al-Risâlah*, ed. Ahmad Shakir, (Cairo: n.d.) 401 f.

23. It is the integrity of the people who transmit hadith, not their number, that concerns us here. Narrators must be trustworthy and honest. They must also fulfill two conditions: impartiality and attention to the validity of the hadith sources they refer to. There should be no missing links in their chains of authority, from beginning to end. With regard to the hadith itself, both the *isnad* and the actual text of the report should be free from any oddities or defects. See Appendix Two.

2. The Qur'an is literally the word of God, and the Prophet's role was simply to convey it, while the Sunna contains the words and actions of the Prophet. It is the meaning and intent of the Sunna that is divinely inspired, not its formal expression.
3. The entire Qur'an has been conveyed to us via many different sources, while the Sunna is only partially related in this way. Numerous independent reports include instructions about the performance of prayers, pilgrimage and so on, but most of the Sunna consists of solitary narrations.
4. The Qur'an has a special status and function beyond simple documentation of the details of religion. For example, its recitation is an act of worship and it should neither be read for meaning alone nor be touched by those who are ritually impure.

The Recording of the Sunna

The recording of the Sunna passed through many phases. Many things the Prophet said were recorded during his lifetime. In the years directly following his death much care was taken to record everything that people remembered of what he said and did. The generation of Muslims who lived after the generation of the Companions placed even more importance on this. Finally, all this information about the Sunna was collated into books and critically assessed.

The most important early collections of the sayings of the Prophet (hadith) are *al-Muwatta* of Imam Malik (d. 179/795), the two collections, both called *Sahih*, by Imam Bukhari (d. 256/870) and Muslim (d. 261/875), four works, all called *Sunna*, by Imams al-Tirmidhi (d. 279/892), Ibn Maja (d. 273/886), Abu Da'ud (d. 275/889), and Nasa'i (d. 303/915), *al-Musnad* of Imam Ahmad b. Hanbal (d. 241/855), and the *Sunan* of Imam al-Darimi (d. 255/869).[24]

24. Mâlik b. Anas b. Abû ʿÂmr b. ʿAmr al-Asbahî, *al-Muwatta'* 2 vols, (Beirut: Dâr al-Kitâb al-ʿIlmîya, n.d.); Bukhârî, Muhammad b. Ismâʿil b. Ibrâhîm b. al-Mughîrah b. Bardizbah, al-Juʿfî, Abû ʿAbd Allâh, al-, *Sahîh al-Bukhârî*, 8 vols., (Istanbul: Matkabat al-Islâmîyah, 1981) English translation in Khan, Muhammad Muhsin, tr. *Translation of the Meanings of Sahih al-Bukhari*, 9 vols, (Chicago: 1976); Muslim b. al-Hajâj al-Qushairî al-Nisâbûrî, *Sahih Muslim*, 5 vols., (Beirut: Dâr Ihyâ' al-Turâth al-ʿArabî, n.d.), English translation in Abdul Hamid Siddiqi, tr. *Sahih Muslim*, 4 vols, (Lahore, 1976); Tirmîdhî, Muhammad b. ʿIsâ b. Surah, al-, *al-Jâmiʿ al-sahih*, 5 vols., (Beirut: Dâr al-Fikr, 1983); Mâja, Muhammad b. Yûsuf b. Mâja al-Qazwînî, [Ibn Mâja], *Sunan ibn Mâjah*, 4 vols., (Riyadh: Sharikah al-Tibbâʿh al-ʿArabîyah al-Suʿûdîyah, 1404/1984); Dâ'ûd, Sulaymân b. al-Gârûd b. al-Ashʿath al-Azdî al-Sijistânî, [Abû Dâ'ûd], *Sunan Abî Dâ'ûd*, 4 vols., (Beirut: Dâr al-Fikr, n.d.) English translation in

In addition to these, some scholars were particularly interested in the part of the Sunna that deals with the practical translation of the Prophet's teachings into daily life, and compiled manuals for popular instruction. Two of these are *Nayl al-'awtar* by al-Shawkânî (d. 1250/1832),[25] a commentary on a well known book by Imam Abdul Salam ibn Taimiya (d. 652/1245), grandfather of Ahmad b. Abdul Halim ibn Taimiya (d. 728/1328), and *Bullgh al-muram min adillat al-ahkam* by Ibn Hajr al-Asqalani (d. 852/1449).[26] A commentary on *Bulûgh al-murâm* by al-San'ani (d. 1099/1687), called *Subul al-salam*,[27] is perhaps better known than *Bullgh al-muram* itself. Both are indispensable for the student of the Sharia.

Other Sources

There are also a few secondary sources of the Sharia that are derived from the Qur'an and the Sunna. Scholars do not always agree on the validity or value of these. Two such sources are consensus, or *ijma'a*, and analogy or *qiyas*. These are accepted by most scholars as valid sources of law. Other secondary sources include consideration of the public welfare, juristic preference, consideration of custom, legal precedent, reports of the Companions, and so on. Scholars do not always agree about the validity of the results obtained by these methods. We will discuss these in more detail in Chapter Four.

Hassan, A., tr. *Sunan Abu Dawud, English Translation with Explanatory Notes*, 3 vols. (New Delhi: 1985); Nasâ'î, Ahmad b. ʿAlî b. Suʿaib, al-, *Sunan al-Nasâ'î*, 8 vols., (Beirut: Dâr al-Kitâb al-ʿArabî, n.d.); Ahmad b. Hanbal al-Shaibânî, [Ahmad], *al-Musnad*, 6 vols., (Beirut: 1983); Dârimî, ʿAbdullâh b. ʿAbdul Rahmân b. Faisal, al-, *Sunan al-Dârimî*, (Dâr Ihyâ' al-Sunna al-Nabawîya, n.d.).

25. al-Shawkânî, Muhammad b. ʿAlî b. Muhammad b. ʿAbdullâh, *Nayl al-awtâr*, 9 vols. (Beirut: Mustafâ al-Halabî, n.d.).

26. Ibn Hajr al-ʿAsqalânî, *Bulûgh al-murâm min adillat al-ahkâm* (Riyadh: 1402/1992).

27. Muhammad b. Ismaʿîl b. Salâh al-Sanʿânî, *Subul al-salâm*, 2 vols. (Beirut: 1980).

2

THE GENERAL CHARACTERISTICS OF THE SHARIA

The divine basis of the Sharia distinguishes it from all other legal systems. Because of its divine origin, the Sharia enjoys an unparalleled authority and inspires admiration and awe in the hearts of those who submit themselves to it. Obedience to the Sharia comes from a firm faith in the completeness, perfection, and eternal authority of the divine writ. God, who revealed the Sharia, is not affected by human whims and emotions, and not subject to the shortcomings and weaknesses of men. Rather, God is the Creator of us all and the One who knows exactly what is best for us: "Would He Who created not know? And He is the All-Kind, the Well-Aware" (67:14).

Because of this, the Muslim—whether governor or governed—must abide by the Sharia. As for those who govern, God has commanded them to rule according to what He has revealed in the Qur'an, and describes whoever fails to do this as disbelievers, wrongdoers, and truly wicked.[1] With regard to the governed He says,

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1. The author refers here to three often quoted verses from The Holy Qur'an 5:44, 45, 47, "We sent down the Torah, in which there is guidance and a light, by which the prophets who submitted (to God) judged the Jews, and the rabbis and the priests by what they were entrusted from the Book, and they were witnesses to it. So do not fear people, but fear Me. And do not sell My verses at a low price. *Whoever does not judge by what God has sent down, those are disbelievers.* In which We wrote for them, 'A life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth and for wounds requital.' But whoever forgives in charity, it will be penance for him. *Whoever do not judge by what God has sent down, they are wrongdoers...* Let the People of the Gospel judge by what God has sent down in it. *Whoever do not judge by what God has sent down, those are truly wicked." OJ.*

> The words of believers when they are called to God and His Messenger for him to judge between them are "We hear, and we obey." And those are the successful (24:51).[2]

Because of its divine origin, the Sharia holds a unique place in the hearts of the Muslims. Respect and deference toward it is an act of faith, as is enforcing it and obeying it. For Muslims, to apply and obey the Sharia is an act of devotion. This obedience is a fundamental aspect of faith.

> No, by your Lord, they will not believe until they make you judge of what has been in dispute between them, find within themselves no dislike of what you decide and submit fully (4:65).

Muslims believe that the Sharia contains the most just, most complete, and most comprehensive system of government possible. This belief explains the great confidence Muslims have in it and their unshakable loyalty to it. Muslims also believe that God is aware of all our deeds, and that we will be held accountable for them.[3]

Muslims usually observe the teachings of the Sharia in good faith. It is the inner call of the conscience rather than fear of the law that causes them to do this. When people, giving in to desire and selfishness, violate some part of the Sharia, guilt pursues them until they repent. There are accounts of people who came to the Prophet and demanded that he punish them for some crime they had committed. They did this without being pursued by any civil authority, acting in earnestness and out of faith in God. They wanted the Prophet to punish them according to God's law so that when they died they would meet their Creator in a state of moral purity.

Throughout their long history, Muslims have lived according to the Law of the Qur'an and Sunna, not only observing the general principles of their faith but also the letter of the law. They used to say the

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2. Also, "And it is not for believing men or women, when God and His Messenger have decided an affair, to have any choice in their affair. And whoever disobeys God and His Messenger, he indeed has clearly strayed" (33:36) and "When it was said to them, 'Come to what God has sent down and to the Messenger,' you saw the hypocrites turn away from you" (4:61).

3. "Whoever has done an atom's weight of good will see it, and whoever has done an atom's weight of ill will see it" (99:7-8).

finger that is cut by the Sharia does not hurt, because it has been cut according to the command of God.

We can give many examples of the Sharia's impact on its adherents. Anas said that Abu Talha was reciting the ninth chapter of the Qur'an, known as "Repentance," and came to the words "Go out, lightly or heavily, and struggle with your wealth and your lives on the way of God! That is best for you if you only knew"(9:41). Abu Talha turned to his sons and said, "Prepare me for battle." They tried to discourage their aged father saying, "You fought with the Prophet until he died. Now we will fight in your place." Abu Talha replied, "Young or old, God hears no excuse," and prepared himself for battle. He fought and died at sea, so far from land that his shipmates sailed for seven days before finding an island on which to bury him.[4]

According to al-Zuhri, Sa'id Ibn al-Musayab insisted on fighting even after he had lost one of his eyes. When someone told him to withdraw he said, "God commanded the light and the heavy to go to war ... . If I do not fight, I may find comfort, but not peace of mind."[5]

On Obedience

To illustrate the history of submission to the Sharia, two examples come to mind. The first of these involves the Arabs' attitude toward the prohibition of intoxicants. In the pre-Islamic period, the Arabs were so fond of wine that they gave it more than a hundred names. Because of their fondness for it, God moved slowly to prohibit strong drink: it was not banned overnight. When the Qur'an announced the absolute prohibition of alcohol, it was declared to be Satan's handiwork.[6] The Prophet then prohibited the Muslims from selling wine and from giving it to non-Muslims as gifts. Immediately after this was announced, the Muslims brought out whatever alcohol they had and poured it into the streets to demonstrate their submission to the Law. What is even more astonishing, some of those who were drinking at

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4. al-Qurtubi, Muhammad b. Ahmad b. Abû Bakr al-Ansârî (d. 671/1273) *al-Jamiʿ li-ahkâm al-Qur'an*, V (Cairo: Dâr al-Kutûb al-Misrîyah, 1952), 150.

5. ibid. VIII, 150-151.

6. "O you who believe, alcohol, games of chance, idols and divining arrows are filth from Satan's handiwork. Avoid them so that you may succeed" (5:90).

the time they heard the verse "Will you then stop" (5:91) threw down their glasses declaring "We have stopped, we have stopped, our Lord!"

The second example involves the matter of veiling. Before Islam, women used to mix with men freely and could even sometimes be seen bare-breasted. God commanded Muslim women to set themselves apart from non-Muslim women by refusing to follow pagan habits and customs of dress, and told them to cover their heads, ears, necks and upper bodies completely. Aisha, Mother of the Faithful, related how the women who had migrated with the Prophet from Makkah reacted when they were told to cover themselves up. She said: "May God bless the first women who immigrated from Makkah. When they heard God's command to 'draw their veils over their bosoms,' they tore their clothes up to make veils" (24:31).[7] As for the women of Madinah,[8] one day Aisha was sitting with a group of women who began praising the women of the Quraish. She said,

> Of course the women of the Quraish are due much praise, but by God's name I have not seen better than the women of Madinah. None are deeper in their faith in the Book of God or more true to the revelation than they are. When the verse describing veiling was first revealed, they listened to their men folk reciting, 'draw their veils over their bosoms.' Straight away, each one of them tore her dress and tied her head closely in submission to the God's command. All of them stood behind the Prophet covered up as though there were crows on their heads. [9]

These women did not wait one or two days in order to buy suitable cloth to make head coverings large enough to draw over their upper bodies. Any available cloth, of any color, was suitable. If they didn't have any cloth, they tore their clothes. They did not mind how they would look, even if it seemed that they had "crows on their heads."

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7. See al-Qurtubî, *al-Jamiʿ li-ahkâm al-Qurʾan*, XII, 230.

8. A'isha said, "the women of the *Ansâr*."

9. See, Ibn Kathîr, Ismaʿîl b. ʿUmar (d. 774/1373), *Tafsîr ibn Kathîr*, III (Beirut: Dar al-Islâm, 1992), 284.

On Financial Obligations

Zakat is a kind of tax levied on Muslims once a year. While it is normal for people to be reluctant to pay taxes, this has not always been the case when Muslims come to pay zakat. Ubay ibn Ka'ab said:

> When the Prophet sent me to collect zakat, I assessed the people's property, one by one, until I came to the very last man. When he had gathered all his wealth before me I couldn't find anything to take other than a young she-camel.[10] So I told him this would be his contribution.
>
> "This camel can neither give milk, nor carry anything on her back," said the man. "I swear by God that neither the Prophet nor any one sent by him has ever taken anything from my property before. I could never consider presenting to God, blessed and exalted is He, any camel that could neither give milk nor carry a load!" He then pointed to another animal and said, "This camel[11] is strong and fat. Take her instead.
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> "I cannot take anything that the Prophet did not tell me to take, but he is not far from here. If you like we'll go see him and you can offer him what you offered me. If he accepts it then pay, and if he doesn't then don't."
>
> "I will," the man answered.
>
> We went together taking with us the camel he'd offered me. When we came to the Prophet the man said, "O Messenger of God, [this man] came to take a portion of my property. By God's name, neither you nor anyone sent by you has ever come to take anything from me before. Once I had collected my property he decided that I should give a young she-camel. But this animal can neither give milk nor carry anything on its back. I offered him this strong young camel but he refused to take it." Then he said, "This is why I have come to see you. Take this camel, O Messenger of God."
>
> "He asked you for what you must pay. But if you want to pay more by way of generosity, we will accept it and God will bless you for it," the Prophet told him.
>
> "Here she is, O Messenger of God. Take her."
>
> So the Prophet told someone to take his camel, then he prayed for the man that God should increase him in wealth and bless him.[12]

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10. Arabic: *ibnat makhâd*, a new-born camel.*OJ*.
11. Arabic: *naqâh*, a female camel able to bear young.*OJ*.
12. Ahmad, V, 142.

The man whom Ubay met believed that his responsibility to pay zakat was to God, not to any public official. Many other people also came to offer zakat. When Omar ibn al-Khattab was Caliph, a group of men came from Syria in order to pay zakat for their horses. They said, "We have been given property, horses and slaves, which we hope to cleanse and to purify."[13]

On Administrative Regulations

The Sharia covers more than the rulings we find in the Qur'an and Sunna. It also includes such things as traffic regulations, municipal affairs, housing regulations, and many other kinds of laws that aim to safeguard the public interest. According to the Sharia, these regulations become binding as soon as the government issues a legislative decree. For example, in recent times Hanafi jurists have argued that when there is epidemic or famine the ruler may call for people to fast. They are then required to fast, so long as they are not exempted in the normal way. While obedience to the ruler is binding so long as he is not in rebellion against God, the ruler also bears a responsibility to apply the Sharia and any laws that relate directly to it. In the Qur'an, God says, "You who believe, obey God, and obey the Mesenger and those of you who are in authority" (4:59). The Prophet said, "Whoever obeys the ruler obeys me, and whoever disobeys the ruler disobeys me."[14] He also said that Muslims must do as their ruler tells them whether this pleases them or not, but if their ruler orders them to do wrong they should not obey him.[15]

Spiritual and Temporal Aspects of Sharia Law

The Sharia recognizes the spiritual and material sides of life. That is why enforcement of it depends first on self-restraint inspired by faith and morality, then, on the authority and coercive power of the state. Sharia law places the interests of this world beside those of the next.

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13. al-Hâkim, Muhammad b. ᶜAbd Allâh b. Muhammad (d. 404/914), *al-Mustadrak*, I (Beirut: Dâr al-Kitâb al-ᶜArabî, n.d.), 400-1.

14. al-Bukhârî, IV (56/109), 8.

15. ibid. (93/4), 105.

A clear distinction between right and wrong, between what is permitted and what is forbidden, guides and reassures Muslims in everything they do.

The Sharia recognizes that human justice will always fall short of the legal ideal it describes. Courts must rule according to the evidence they have. If a witness has lied or documents have been falsified, the verdict of the court is legally enforceable but religiously invalid. To willfully act upon such a ruling is prohibited by religion. This is confirmed in the Qur'an and the Sunna. The Qur'an says,

> And do not eat up your wealth among yourselves dishonestly or try to bribe officials with it in order knowingly to eat up part of the people's property in sin (2:188).

The Prophet said, "You request my ruling to settle your disputes. Some of you may be more eloquent in presenting their argument and so I may judge in favor of whoever is more eloquent. To whomever I give a portion of his brother's property by mistake, I cut a piece of hell-fire, so he should not take it."[16]

The Sharia, then, has a judicial aspect and a religious one. A judge rules according to the evidence that is before him but the verdict of God is according to truth. Therefore, the ruling of a judge may fall short of an ideal ruling according to religion. For example, if a person releases someone from a debt but does not inform him of it, he may still legally claim his debt from the man. In such a case, a judge would probably rule against the debtor, since neither the judge nor the debtor would know that the debt had been canceled. While this ruling is formally valid according to the law, it is invalid in religion since God and the creditor would both know that there was no longer any debt to claim. Therefore, Sharia law makes a distinction between a legal verdict and a religious ruling. Legal rulings come out of the courts and result from the activities of judges, while religious rulings belong to the realm of theoretical law and are normally issued in response to a question presented to a mufti, the senior religious scholar in any given country. A judge will rule according to his understanding of the principles of Sharia law, legal precedent, and the evidence presented

16. al-Bukhârî, III (52/27), 163.

to him. He will not normally consider the purely religious dimensions of a problem. The mufti, on the other hand, must consider all aspects of a problem. If there is a conflict between the religious and legal aspects of a question, the mufti will rule according to the religious view of it.

When discussing hypothetical cases, scholars frequently say that while the legal ruling is such and such, it differs from the correct religious position. For example, a creditor may demand payment of a debt but fail to prove to a judge that he is actually owed any money. Then the debtor could take the opportunity to refuse payment. From the point of view of religious law, the creditor may still recover his right without the debtor's consent, or even without his knowledge. But no judge would be able to support a creditor's use of force if the latter could not prove that he really had a debt to recover.[17]

MORALITY

A second characteristic of the Sharia is its attention to morality. This attention is also the result of the Sharia's divine origin. The Sharia is a moral law in the full sense of the word. Thus the Prophet Mohammed said, "Verily, I have been sent for the perfection of morality."[18]

The Sharia aims to define the duties and obligations of human beings, first before God and then before the community. The legal content of the Revelation guides the individual to the fulfillment of his obligations, which are in fact the rights that others hold over him. People bear obligations towards one another. To observe these obligations is to render each other our rights. Thus the human being may be seen as a bearer of responsibility. Humanity was not created without purpose, nor left to solve its problems alone: human beings must then have responsibilities as well as rights.

The objective of the Sharia is to insure the stability of society and the regulation of social affairs. Human legislation may sometimes deviate

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17. Mustafâ Ahmad al-Zarqâ', *al-Fiqh al-islâmî fî thaubihi al-jadîd: al-madkhal al-faqhî al-ʿâm*, I (Damascus:1967-8), 58-9.

18. al-Hâkim, *al-Mustadrak*, II, 613, al-Hakim says it is authentic *(sahîh)* according to the criteria established by Imam al-Bukhari.

from the principles of morality and religion in order to achieve these goals.

The Sharia has made human welfare—in terms of social stability and personal relations—the central focus of public and private life. In so doing, it has broadened people's horizons and protected the sanctity of spiritual and moral values.

As we have explained above, the Sharia clearly addresses both spiritual and temporal aspects of life. The temporal side of the Sharia governs what is external to the life of the community, for example its public organization and the management of the day to day affairs of the world. On the other hand, the spiritual concerns of the Sharia apply to the inner life of the individual. Here the Sharia guides each Muslim from within his own heart. Because of this, the Sharia is able to impose special kinds of penalties for certain transgressions and leave their enforcement to the conscience and piety of each Muslim. These penalties—sometimes referred to as *kaffara*, or penance—are beyond the jurisdiction of courts and judicial authorities. For example, the penance for breaking an oath is to feed ten poor people, to provide them clothing, or to buy the freedom of a slave, or to fast for three days.[19]

The penance for accidental homicide is to buy the freedom of a Muslim slave, "And whoever does not have the means must fast two consecutive months as a penance from God" (4:92). The penance for breaking the fast of Ramadan is the freedom of a slave, a fast of two consecutive months, or the feeding of sixty needy people. Thus penance is a penalty that involves worship, or you could say that it is worship that contains a penalty. Either way, its central element is a moral responsibility that cannot be enforced by the state. Islam does not permit a double standard of law and morality, just as it does not acknowledge any distinction between religion and politics.

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19. "The penance for it [breaking an oath] is the feeding of ten of the needy with the average of what you feed your own family or the clothing of them, or freeing a slave, and for him who does not find [the means to do so] then a fast of three days. This is the penance for your oaths when you have sworn" (5:89). According to the majority of scholars this order of precedence must be maintained, however, Imam Malik thought that it was up to the individual to choose which type of penance he would offer.

Human Law and the Sharia

Custom is an important source of legislation. With regard to human law, the behavior that people have come to recognize among themselves as normal may be codified into a written legal code even though a given custom may be harmful or unjust. Human law is ultimately made in the image of society, for better or for worse. The Sharia liberates society from the pressures of selfishness and greed, and frees people from the chains of degenerate traditions and anti-social habits. Its purpose is to heal and strengthen rather than to justify weakness and perversity by giving these an air of legality. The Sharia sanctions only the good and the fruitful of what society embraces.

The standards of morality reflected in the Sharia are established by the Qur'an and the Sunna, not by custom. For example, as we mentioned earlier, at the time of the revelation, the Arabs were fond of wine and gambling and had more than a hundred words for wine. The Sharia contradicted the customs and attitudes of the Arabs who saw nothing wrong in strong drink and gambling. It also ignored the commercial and economic benefits that some people derived from the sale of alcohol. The Qur'an simply states, "They question you about intoxicants and gambling. Say, 'In both is great sin and (some) virtue for people, but the sin of both is greater than their benefit'" (2:219). According to the Qur'an, moral values are more important than commercial interests.

Before Islam, concubinage was common among Arabs and slave women were often used as prostitutes. Several kinds of extra-marital relations, collectively known as *istibda'*, were common. The Arabs saw nothing wrong in any of these since they formed part of their customs and traditions. Nevertheless, God prohibited all sexual acts outside marriage saying, "And do not consider fornication or adultery. Either is an immoral act and an evil way" (17:32), and "that you not take up vices, whether openly or secretly..." (6:151).

In addition to regulating sexual relations through marriage, the Sharia requires men and women to behave modestly and with self-restraint. This is to protect the community from illicit sexual behavior, which always poses a threat to the fabric of society.

> Tell believing men to lower their eyes and guard their privates. That is purer for them. God is Well-Aware of what they do. And tell the

believing women to lower their eyes and guard their privates... (24:30-1).

Temporary interests are not the only concern of legislation, nor are they the only focus of commands and interdictions. The purity of the soul matters equally. Therefore, it is not surprising that the Qur'an speaks of giving alms in these terms: "Take alms from their wealth to purify the..." (9:103). This is a moral objective that never occurred to tax collectors or financial planners.

Islamic legislation does not stop at codifying morals but it goes on to protect them and to punish those who defy them. The Sharia prescribes penalties for adultery and drunkenness, among other things. In some cases, such as gambling, local rulers are free to impose their own punishments. This differs from Western law which does not generally place such a clear emphasis on issues of public morality. For instance, the philosopher Kant drew a sharp line between legality and morality of action and defined justice as "the apparent execution of law."

As religion becomes less and less important, issues of law and morality become divorced. The result of this is usually a disregard for, and degeneration of, moral standards. Thus, issues of morality pose a constant source of difficulty in modern times. Examples of this are the problem of sexual license and the trade in intoxicants and pornography.

Noel Coulson discusses this problem in his book, *Conflicts and Tensions in Islamic Jurisprudence* and compares Islamic law with English law:

> Islamic law embodies the principle of strict enforcement of sexual morality in the severe punishment it prescribes for the offence of *zina*, or fornication. Under English law a sexual relationship outside marriage is not a legal offence unless it is aggravated by circumstances such as lack of consent, the young age of the girl, the blood relationship of the persons concerned, or unnatural behavior, which will amount to the criminal offenses of rape, unlawful carnal knowledge, incest, bestiality, or sodomy. Islamic law, on the other hand, holds that any sexual relationship is a crime unless it is between husband and wife or was, in the old days, between a master and his slave concubine. At the same time, the liability of the parties to an act of *zina* for punishment cannot, in practice, be dissociated from the

rules relating to proof of the offence. This must be established by the eyewitness of four adult Muslims of established integrity of character. No doubt an act of sexual immorality committed in circumstances where such testimony is forthcoming would amount at least to the criminal offence of public indecency, even under English law.[20]

Differences of Approach and Understanding among Jurists

These observations on the Sharia and morality should be understood within the general context of Islamic jurisprudence, of which there are four main currents or schools. The Hanafi school, for instance, maintains that formal correctness and apparent conformity to the law is in itself sufficient evidence of validity, at least in the matter of contracts. This takes no account of intent, ulterior motives, or other extenuating circumstances. On this basis, the Hanafi jurists have sanctioned certain acts that other jurists have forbidden, and distinguished between what is legally permissible and what is religiously prohibited. A Hanafi judge may paradoxically support the legality of a religiously prohibited act so long as certain legal conditions are satisfied.

Of course, Hanafi fiqh does sometimes consider motive and intent. For instance, a man who is about to die may not divorce his wife simply in order to deprive her of her inheritance. According to Hanafi scholars this divorce is legally invalid.

Fiqh is ultimately a matter of fallible human opinion and does not necessarily reflect the spirit of the Sharia, which places great emphasis on motivation and intent. The Prophet rejected any action that was not based on intention and said, "Actions are founded on intentions, and every person will be rewarded according to what they have intended."[21]

The Hanbali jurists seem to come closest to the true spirit of the Sharia, giving primary consideration to intention beyond sterile formality and conformance to legal criteria. Many of these scholars have passionately denounced the sanctioning of loopholes and technicalities, whose purpose is merely to get around the Sharia and

20. Coulson, N. J., *Conflicts and Tensions in Islamic Jurisprudence*, (Chicago: 1969), 77.
21. al-Bukhârî, I (1/1), 2; Muslim, V (45/155), 1515.

undermine its authority. They support their arguments with evidence from the Qur'an, the Sunna, and the judgements of the Companions and the first generations of the Muslims. One of the most prominent advocates of this approach was Ibn Taimiya (d.711/1311). His student, Ibn al-Qaiyim (d. 751/1350), takes up the same theme in two of his books, *I'lam al-muwaqi'in* and *Ighathat al-lahfan min mukayid al-shaytan*.

As an example of their approach let us see what they had to say about divorce. Ibn Taimiya and Ibn al-Qaiyim felt that this subject had been mishandled for many centuries and that while people had been observing the letter of the law they had forgotten its spirit. They refused to accept the validity of a divorce pronounced by someone who was drunk or angry. Furthermore, they challenged the validity of divorces resulting from an oath, ("If you don't do such and such I will divorce my wife"), or from the fulfillment of some predetermined condition ("If your father does such and such you are divorced"). Finally, they rejected the simultaneously pronounced multiple divorce. Ibn al-Qaiyim and Ibn Taimiya did not distinguish between the moral values of divorce and the legal view of it. Such moral values have now been incorporated into the family laws of the Islamic countries.

The value the Sharia places on high moral standards is indicative of the moral character of Islamic Law. The Sharia promotes high moral standards for their own sake, not merely because they contribute to social stability and public order. For example, the prosecution of war is subject to certain moral constraints. Sharia law prohibits combatants from demolishing buildings, destroying crops, mutilating corpses, or killing non-combatants. These guidelines, among others, were established by the Prophet Muhammed and his immediate successors.

Imam Muslim reports that whenever the Prophet appointed someone to command a military unit, he would advise him to be pious and to be good to his fellow Muslims, and also tell him to "Fight, but do not plunder, do not break your pledge, and do not mutilate the dead or kill children."[22] Anas also related that when the Prophet deployed an army he would say, "Forward, in the name of God. Do not kill the

22. Muslim, III (32/2), 1356 (no. 3-1731).

elderly, children or women. Be righteous and strive toward truth. God loves those who persist in righteousness."[23]

Abu Bakr advised one of his commanders saying, "You will find among them monks, leave them to pursue their own purpose. You shall observe ten points: kill no women, kill no children and kill no old people, do not uproot trees, destroy habitations, neither kill sheep nor camels except for food, do not destroy crops, and be neither treacherous nor cowardly."[24] Omar gave the same advice to his commanders. These were the rules of war the Muslims observed in their early military campaigns.

An Example of the Moral Basis of the Sharia: The Welfare and Treatment of Animals

Ethics are also the driving force behind the Muslim attitude toward animals. Sharia law provides for the protection of animals, the maintenance of their welfare, and the prevention of cruelty to them. This is an entirely moral issue since cruelty to animals could not threaten the social or political stability of society. Animals cannot revolt, go out on strike, prosecute their owners for unfairness or abuse, or challenge their owners' interests in any way. The issue of the welfare of animals is ultimately related to concepts of justice, mercy, piety, and fear of God.

There are several hadiths about the treatment of animals. In one, a woman was told she would be punished in her grave because she had confined a cat to death. She had neither fed it, nor watered it, nor had she set it free to fend for itself.[25] In another case, the Prophet came across an emaciated camel and said, "Fear God in these dumb animals. Ride them in good health and [slaughter] them in good health." Imam Bukhari reports the story of a man whom God praised and forgave because he gave water to a thirsty dog. The Prophet mentioned this and said, "There is a reward for kindness to every living thing."[26]

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23. Abû Dâ'ûd, III, 37 (no. 2614).
24. Mâlik, II, 6.
25. al-Bukhârî, IV (60/54), 152.
26. Abû Dâ'ûd, III, 23 (no. 2548); al-Bukhârî, III (46/23), 103).

The Prophet also said, "God has prescribed proficiency in all things. Thus, if you kill, kill well, and if you slaughter, slaughter well. May each one of you sharpen his knife and spare the beast its suffering."[27] In another report the Prophet came upon a man who had tied up a sheep and was sharpening his knife in front of it. He asked "Do you want to kill it twice? Can't you sharpen your knife before you tie it up."[28]

Ibn Omar once passed by some boys who were shooting arrows at chickens. If they missed they would say that the arrow would be for the bird's owner. The boys ran away when Ibn Omar came. He called out, "Who did this? May God curse whoever does such a thing! The Prophet used to curse people who took live animals for target practice."[29] The Prophet also forbade the baiting of animals to fight and prohibited beating them or branding them on their faces.[30]

Muslim rulers used to disapprove of people for mistreating animals. Malik relates that Omar ibn al-Khattab once passed by a donkey standing with two bricks on its back. As the Caliph was removing the bricks, the donkey's owner came and said, "What are you doing with my donkey, Omar? Are you its Sultan as well?" Omar told her, "What do you think keeps me here?" Ibn Rushd (d. 595/1198) explains that the meaning of this is obvious and mentions that the Prophet said, "Each of you is a shepherd responsible for his flocks, and the Imam is a shepherd responsible for his flock."[31] Omar said, "If a camel dies at the bank of the Euphrates as a result of carelessness, I would fear that God might ask me about it."[32]

Al-Musayab ibn Diram said, "I saw Omar Ibn al-Khattab beating a porter and telling him that he should not lay a load on his camel that it could not bear." Following the example of Omar Ibn al-Khattab,

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27. Muslim, III (34/57), 1548 (no. 57-1955).

28. Al-Hâkim, *al-Mustadrak*, IV, 231; al-Hakim says it is authentic *(sahîh)* according to the criteria established by Imam al-Bukhari. The hadith goes back to Ibn Abbas.

29. Muslim, III (34/59), 1550 (no. 59-1958).

30. Abû Dâ'ûd, III, 26 (no. 2562, 2564).

31. al-Bukhârî, I (11/11), 215.

32. al-Katâni, Muhammad ᶜAbd al-Hayy, *al-Tarâtib al-idâriya: nizam al-hukm al-nabawiya al-idâriya: nizam al-hukm al-nabawiya*, I (Beirut: Dâr al-Kutub al-ᶜArabî, n.d.), 268.

another caliph, Omar ibn Abdul Aziz, once wrote to Hayan, (his govenor) in Egypt, saying "It has come to my knowledge that there are transport camels in Egypt that are loaded with more than a thousand pounds. I do not want to see any camel carrying more than six hundred pounds."[33]

Later, Muslim scholars established minimum standards of care for various kinds of domestic animals. This information is normally found in the chapter on *nafaqat*, or expenditures, in books of jurisprudence. This was the first time such things were set into law. The motivation for it was not merely to preserve or safeguard material assets or communal interests. An important aspect of this legislation was its moral and ethical basis. Its primary impetus was to prevent injustice and suffering.

Animals feel pain and know fear but have no means of defending themselves or protecting their interests. The scholars determined when it was justifiable to beat animals used for carrying and pulling, where on their bodies they could be beaten, how hard they could be beaten, and the tools with which to beat them. For example, they said it was unlawful to beat an animal that slips or stumbles. It is also unlawful to hit a beast on the face, or with an iron bar, or to stick it with sharp spurs.[34]

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33. ibid. II, 152.

34. According to al-Katani, "An animal's owner has to feed and water it even if it is no longer of use to him. This is clear from what Ibn Omar said about the woman who was punished because of a cat she confined without feeding or watering it until it died. If the owner is unable to supply its needs, he should either sell it or hire it out or, if it is good for meat he may slaughter it. It is prohibited to curse animals. Once, when the Prophet was travelling he heard a woman cursing her camel. He said, 'Remove its load and let it go, now that it is cursed' [Muslim, IV (45/24), 2004 (no. 80-2590)]. He also said 'No cursed camel shall be in our company' [Muslim, III (45/24), 2005 (no. 82-2596)]. The Prophet also said, "Cursers are neither intercessors nor witnesses on the Day of Resurrection" [Muslim, III (45/24), 2006 (no. 86)]. It is also prohibited to load a pack animal with more than it can carry, or to milk it in a way detrimental to its young, because its milk is for its own offspring. Someone who milks animals should clip their nails so as not to hurt the animal's udder. An animal's forelock or tail should not be cut, and no bell should be hung on it for identification. It is reprehensible to overfeed animals or force feed them to make them fat. Those who torture chickens in cages, confine sheep without food or water, or tether mules and leave them without food or water to the brink of death, will be punished by God in this world or in the next, unless forgiven..." al-Katâni, *al-Tarâtib al-idâriyah*, II, 151-2.

It is the task of every Muslim to object to any unfair act and report it to the ruler. In his manual of public policy, *Ahkam al-sultaniyyah*,[35] al-Mawardi (d. 450/1058) said that the inspector of weights has the right to object to whoever loads his pack animal with more than it can bear. Sheikh Abu Ali ibn Rahhal said that being kind to animals is a matter of following the Sunna of the Prophet. Since there is a reward in being kind to them, there must also be sin in being cruel to them. However, Ibn Rahhal goes on to say that if an animal's owner overloads it, he can not be told to stop, the matter must be left to his conscience and the fear of God. This position is contradicted by the hadith that promises a reward for kindness to all living things which Abu Omar cited as evidence that the "abuse of animals is sinful. What is sinful is abominable, and the abominable should be eradicated. Had the Imam's warning to fear God been a sufficient deterrent [for people to desist from lawlessness], then there would have been no need for punishment in the Sharia."[36]

Concern for the welfare of animals has always been a feature of Islamic law. Recently, morally and ethically minded people have again spoken out for the protection of animals, echoing the moral and ethical concern that lies at the source of Sharia law.

PRACTICALITY

The Sharia is not above recognizing reality for what it is and moving to reform and improve it. At the same time, it never loses sight of the high moral standards that it seeks to establish. This is not a utopian dream of a perfect world. It does not entice us with the impossible ideals of Plato's *Republic*[37] or of al-Farabi's *al-Madinat al-fadilah*.[38] Nor does it share the communist's faith in the dawn of a new age when property will vanish, classes will be non-existent, and there will no longer be any need for authority or justice, police or prisons. Rather, the Sharia regards human beings as they are, as God has created them,

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35. Alî b. Muhammad b. Habîb al-Mâwardî, *Ahkâm al-sultânîya*, (Beirut: 1982).

36. al-Katâni, *al-Tarâtib al-idâriyah*, II, 103-4.

37. Plato, *The Republic*, tr. Benjamin Jowlett, (Airmont: 1968).

38. Muhammad b. Muhammad b. Tarkhan al-Fârâbî (d. 339/950), *Kitâb 'aarâ' ahl al-madînah al-fâdilah*, ed. Ahmad Nasrî Nâdir (Beirut: 1959).

with a terrestrial body and a heavenly spirit, with animal instincts and high aspirations, with selfish motives and altruistic tendencies, with an urge to self indulgence and an impulse toward piety.

The Qur'an calls for the same punishment to be inflicted upon the aggressor as the agressor had inflicted on others. This established a degree of justice and also left the door open for people to improve themselves and raise themselves up in piety and grace. The Qur'an says,

> The reward of a bad deed is a bad deed equivalent to it, but whoever excuses and makes peace, his reward is up to God. He does not love wrongdoers (42:40).[39]

Neither the Qur'an nor the Prophet requires Muslims to renounce the world. The Prophet said, "Blessed is the rightful wealth of a righteous person"[40] and, "No wealth has been more useful to me than that of Abu Bakr."[41] The Prophet prayed for God to bless his personal servant, Anas, with increasing wealth and many children.[42]

Man's love for wealth is an aspect of reality and an integral part of human nature. There is no danger in taking this into account and recognizing it, while striving to elevate and refine this natural desire and direct it to the benefit of society. To repress such a thing is both useless and futile. While the Sharia sanctions the right of ownership, it imposes certain precautionary restrictions, as will be explained later.

The Sharia does not depend solely on religious and moral restraint to protect people's rights but also contains a system of punishment. It is not possible to discipline all people just by teaching them the difference between right and wrong. For some a painful lesson is necessary to encourage them to return to the right path. Punishment also discourages others from violating the law. The third Caliph,

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39. Also, "If you punish, then punish with the like of what you were punished with. But if you are patient, then it is better for the patient" (16:126).

40. Ahmad, IV, 197.

41. Ahmad, IV, 366.

42. Anas said, "My mother said, 'O Allah's Apostle! Please invoke Allah on behalf of your servant [Anas].' He said, 'O Allah! Increase his wealth and children, and bestow your Blessing on whatever You give him'" al-Bukhârî, VII (80/19), 152.

Othman, used to say, "God restrains by force whoever is not restrained by the Qur'an."

The Sharia recognizes two types of punishment. The Qur'an determines the first type. These are the mandatory Islamic punishments, or *hudûd*, which includes *qisâs*, the right of retaliation. Since these come directly from the Qur'an and Sunna there is no disagreement about them among scholars. The second type of penalty is discretionary. This can range from a simple caution to capital punishment, and includes fines, imprisonment, and public humiliation.

Another example of the realistic nature of the Sharia is that while it actively promotes peace, it recognizes that war is an inevitable aspect of human existence.

> For if God had not defended people against one another, monasteries, churches, synagogues and mosques, where the name of God is mentioned a lot, would have been pulled down" (22:40).[43]

According to the Sharia, jihad is obligatory. The rules governing it have received wide attention by jurists. We find the same practical approach in the rules governing divorce and polygamy. Some people are not sucessful in their marriages. It is unreasonable to advise them simply to show patience in their relationships, especially in the case of marriage, which is a life-long and intensely personal commitment. To live with someone with whom you have nothing in common, and from whom you have no relief, is the worst of misfortunes. The Arab poet al-Mutanabbi, said, "The bane of the free man is to have an enemy whose friendship is unavoidable."

The Sharia has allowed divorce but considers it as the furthest limit of permitted things. It also imposes rules and restrictions to prevent the abuse of divorce, which should be sought only when all else fails. According to popular wisdom, "If there is no harmony, then separation is better." The Qur'an says,

> And if the two separate, God will provide for each from his plenty. God is Resourceful, Wise (4:130).

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43. "And if it were not for God's defence of the people, some of them by others, the earth would have rotted" (2:251).

According to the Sharia, it is better for men to marry more than one woman than to establish sexual relationships outside marriage. In societies which forbid plural marriage by law, extra-marital relationships are often tolerated, or even accepted as normal. Usually, however, these relationships lack the moral and legal responsibilities of marriage and people involved in them, and children born of them, sometimes face legal or social discrimination.

The realistic nature of the Sharia can be seen in its admission that it is impossible for a man to treat his wives equally in every way. It therefore requires equal treatment of co-wives in matters where equal treatment is possible, such as in the provision of food, clothing, and shelter, physical companionship and even the frequency of sexual intercourse. Equal treatment of co-wives does not apply to the things that are beyond human control, such as the degree of love and attachment one feels toward each of them.[44] Referring to his wives the Prophet used to say, "My Lord, what I have is what I have been given, so do not blame me for what You have that I do not," by which he meant command of the heart.[45]

The Sharia recognizes that human needs my take precedence over legal necessities. Such pressing needs may be either individual or collective. Either way, the Sharia waives ordinary prohibitions in the face of dire necessity. Thus, under certain circumstances the Sharia suspends restrictions regarding food and drink, clothing and commercial transactions and so on. The Qur'an provides the authority for these exemptions. For example, following its description of dietary prohibitions the Qur'an declares that a person who violates these out of necessity will not be blamed. The Qur'an repeats this four times.[46] Although men may not wear silk, when Abdul Rahman ibn Auf and

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44. "You will not be able to deal equally between wives, however much you wish. But do not turn altogether away (from one), leaving her hanging. If you do good and fear God, then God is forgiving, merciful" (4:129).

45. Tirmidhi, II (40), 304 (no. 1149).

46. Also, "But whoever is driven by necessity, neither craving nor going to excess, it is no sin for him." (2:173); "And whoever is forced by hunger, not by will, to sin, then truly God is Forgiving, Merciful (5:3)"; "...except for whoever is forced, unwillingly and without disobedience, for truly your Lord is forgiving, merciful (6:145)"; "But whoever is forced to, without craving it or sinning, then God is Forgiving, Merciful" (16:115).

al-Zubair ibn al-Awam complained to the Prophet about cronic itching, he told them they could wear it.

The Sharia takes account of the society's changing nature. When change is for the worse, scholars may refer to it as the "trials of the times." Change, however, is sometimes positive. Islamic jurists recognize this and admit that legal rulings should be revised to take account of changing social conditions. The authority for this comes from the Sunna of the Prophet, who instructed us to follow the guidance of his rightly guided successors and of his companions. Not only the Sunna, but also the Qur'an, strongly supports this attitude toward change and appropriateness to changed situations. We shall examine this matter in detail in the following chapter.

We can see the realistic nature of the Sharia again when we consider how the law regards allegiance to the ruler. Even though there may be another man better qualified and more able to rule, this fact does not affect the obligations of loyalty to the leader. The preservation of order, and the defence of public welfare both require this. Sharia law requires obedience to political rulers regardless of their weaknesses. This is in order to preserve national unity and to prevent bloodshed. So long as the ruler is a believer, loyalty to him is obligatory. Disbelief of the ruler must be proven with the Book of God. Even then, armed rebellion against him is prohibited if this will result in greater suffering than is inflicted by his rule.[47] It is on this basis that jurists founded the doctrine of the "rule of the conqueror," even though the legal authority to rule rests in public election and approval, and in the voluntary offering of allegiance.

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47. Imam al-Shatibi explains that it is impossible to fulfill the obligation of jihad without a leader. While it is desirable for a leader to be just, justice is not an essential quality of leadership and our desire for justice must not prevent us from fulfilling our obligations. Because of this, the Prophet ordered us to follow the unjust ruler in times of strife. Al-Shatibi quotes the Prophet , "Jihâd is obligatory upon you under the command of every leader whether he be pious or impious; prayer is obligatory upon you behind every Muslim, whether he be pious or impious—and even if he commits grave sins; prayer is obligatory upon every Muslim, whether he be pious or impious—and even if he commits grave sins." Although this hadith is weak (*daᶜîf*), it conforms to the practice of the early generations of the Muslims. See Shâtibî, Ibrâhîm b. Mûsâ b. Muhammad (d. 790/1388), *Kitab al-Muwâfiqât fî usûl al-sharîᶜah*, II (Cairo: Maktabat al-Tijârîyah, n.d.), 15, and Abû Dâ'ûd, III, 18 (no. 2533). [For further discussion of this hadith see Muhammad Nasr al-Dîn al-Albânî, *Daᶜîf sunan Abî Dâ'ûd*, 249. *OJ.*]

The Sharia requires us to take the least harmful course of action. We must be patient with the way things are if moving to change them will make things worse. For example, the Prophet wanted to rebuild the Ka'aba but later decided against it. A'isha said she heard the him say, "I would have demolished the Ka'aba and rebuilt it on the original foundations laid by Abraham had your people [the Quraish] not only recently entered Islam." Since the people of Makkah were still close to disbelief, the Prophet preferred not to try their faith by doing this.[48]

One of the Sharia's central concerns is the relief of hardship. Laws must be easy to live by and enforce. One of the supplications in the Qur'an reads, "Our Lord, do not burden us with what we do not have the strength to bear!" (2:286). The Prophet said that God had accepted this prayer, and added, "I have been sent with a religion of truth and goodwill."[49] He also said to his Companions, "You have been sent to make things easy, not to make things difficult."[50] The Qur'an confirms this attitude in several verses.[51] Ibn Nujaim (d. 970/1563) believes that all dispensations and special exemptions in the Sharia depend upon the relief of hardship. For example, he explains,

> It is permissible to perform the obligatory prayer sitting while aboard ship if there is a risk of dizziness, even if one may be able to stand. The fast is for one month out of twelve, the pilgrimage is once in a lifetime and zakat is two and a half percent. All of this is in the spirit of ease.
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> Divorce, too, is intended for the relief of the hardship incurred when two people are obliged to remain together in the face of continuous animosity and disagreement. Women may petition for divorce themselves, or obtain it upon payment of a consideration. It is also easy to annul a divorce within three months of its pronounce-

48. al-Bukhârî, II (25/42), 155.

49. Ahmad, V, 266.

50. al-Bukhârî, I (4/58), 61.

51. Also, "God wants you to have it easy—He does not want you to have it hard..." (2:185); and "God does not want to place a burden on you..." (5:6); "[God] has not set any hardship in the faith..." (22:78); "That is an easing from your Lord and a mercy" (22:78); "God wants to lighten the burden for you, for man was created weak" (4:28).

ment, so long as it is not an irrevocable, third divorce: the limit of three times is intended to protect women from a repeated threat.

The Sharia allows the making of wills so that the faults committed in life may be corrected, but a person's heirs must still approve any changes made to a will. To protect them from potential loss, no more than one third of an estate may be disposed of in this way.

God will not call to account those who unsuccessfully make a sincere and competent effort to discover the correct course in law. To be allowed to act positively on the strength of an informed opinion is to make the law easy to follow and carry out. If we were always required to act in absolute certainty, we would surely fall short of our goal.[52]

Special Exemptions and the Flexibility of the Sharia

Jurists mention several situations or circumstances which provide exemptions from normal obligations. These include illness, travel, compulsion, error, forgetfulness, and necessity.

Ibn Nujaim has classified special exemptions into seven categories. The first category is the total suspension of obligations in certain circumstances, known as *isqât*. For example, since prayer is offered on a regular schedule, women are exempted from it when menstruating (and do not have to make it up later). The same rule applies to someone who has been unconscious for more than twenty-four hours, and to those so ill that they are unable even to move their heads.[53]

The second category is a reduction of obligations, *tanqîs*, such as shortening the prayer while traveling,

The third is the substitution of one form of observance for another, *ibdâl*. For example, when there is no water, one may perform ablution before prayer using clean soil instead.[54] If one prays sitting, a nod followed by a shallow bow replaces a deep bow followed by a prostration. Sometimes, a person can feed others instead of fasting.

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52. Ibn Nujaim, Zain al-Dîn ibn Ibrâhîm, *al-Ashbâh wal-nazâ'ir*, (Damascus: Dâr al-Fikr, 1983), 84, 87-90 *passim*.

53. ibid. 84.

54. This is called *tayâmmum* in law books.

The fourth category is called advancement, or *taqdîm*. This means to complete a ritual obligation before its appointed time, such as praying Noon and Afternoon prayers together at Arafat when performing the Pilgrimage, or performing two prayers together when traveling. It is also possible to pay the poor tax, or zakat, before it is due, so long as the liability to pay it is certain. This also applies to *zakat al-fitr*, due at the end of Ramadan. According to authenticated *(sahih)* hadiths, this can be paid even before the beginning of Ramadan so long as you are able to pay and a suitable recipient is available.[55]

The fifth is to delay something beyond its appointed time, *ta'khîr*. Thus pilgrims combine sunset prayer with the night prayer at Muzdalifeh, a place near Makkah. During the Pilgrimage, fasting may be delayed for the sick and for travelers, and the prayer may be delayed if it is not possible to interrupt what you are doing, as in the case of rescuing people from danger.

The sixth category Ibn Nujaim mentions is special dispensation, or *tarkhîs*. This includes such things as the use of alcohol for medicinal purposes and allowing a person who, because of a lack of water, has not been able to clean himself completely after defecating to perform the obligatory prayer.

The seventh and last category is change, called *taghayyur*. This refers to a change in an established pattern of ritual events. For example the way the cannonical prayer is communally performed may be altered on a battle field when, in the face of an agressive force, the congregation may be split in half. One group of men prays while the other stands watch. The prayer is thus completed in two shifts. This is called the prayer of fear.[56]

Adoption of Gradual Approach to Change

The Sharia has adopted a gradual approach to imposing obligations and restrictions. This underscores the realistic nature of Islam and its flexibility in dealing with human beings.

When God first prescribed prayer, fasting, and alms-giving, He introduced them in stages. The prayer consisted of two sets of bows

55. Ibn Nujaim, *al-Ashbâh wal-nazâ'ir*, 94.

56. ibid. 92.

(rak'at) and this is still the way travelers pray today. Later, God increased the number of bows to four in the midday, afternoon, and night prayers.

Fasting was at first voluntary. Whoever wanted to fast would fast, and whoever didn't want to fast, would have to feed a poor person every day instead. This was what Imam al-Bukharî related about Salamah ibn al-Akwa's explanation of the verse:

> And for those who can afford it, there is a substitute, the feeding of a man in need. But whoever does good of his own free will, it is better for him. And it is better for you to fast if you only realized it (2:184).

The obligation to give alms was first announced in Makkah. At this stage it was unregulated and not linked to any time limit. When and how much to pay was left to conscience. The poor-tax, or zakat, we know today with its specific quantities and time limits was introduced later in Madinah.

Prohibitions were not established all at once either. Behavior that is deeply rooted can take time to change. It was not possible to free people from the grip of a common practice by a sudden command. Instead, God prepared them psychologically and mentally before announcing prohibitions absolutely. When this was finally done, the Muslims complied immediately and without difficulty. The clearest example in this respect is the often-related prohibition of alcohol.

To apply the Sharia to Islamic society today, we must follow this system of gradual change. We live in a world where cultural, legal, and social aggression is routinely directed against Islam. If we want to establish a truly Islamic society, we should not delude ourselves into believing that this can be achieved with the stroke of a pen, a royal decree, or a parliamentary decision. Such a society must come into being gradually, as a process of intellectual, psychological, moral, and social development. We must find suitable legal alternatives on which to base the Islamization of long established social institutions. By gradual change, we do not mean to put things off, nor to defer the reestablishment of the Sharia. Rather, we need a sincere and serious program of change, each step of which leads to a higher level in a carefully planned and organized way. Our final aim must always be the complete and exclusive establishment of the Sharia within the context of a truly Islamic society.

The Prophet's approach was to transform the life of disbelief, called *jâhilîyah*, into the life of Islam. He stayed in Makkah for thirteen years, confining his mission to raising a faithful generation who would be able to bear the burden of the Message and fulfill the obligations of jihad, to protect and propagate Islam in the world. This is why the Makkan period was a time of education and preparation rather than legislation and codification. The Qur'an addressed matters of belief and faith, and directed itself to the moral and spiritual development of the Muslims, long before any mention was made of law.

It is instructive to note the words of Omar ibn Abdul Aziz, the fifth of the "Rightly Guided Caliphs"[57] replying to his son Abdul Malik, a deeply pious young man, who had asked his father, "Why don't you enforce the law strictly? It doesn't matter to me if you and I are both killed on the path to truth!" Of course the boy wanted his father, whom God had entrusted with the leadership of the Muslims, to put an end to dishonesty and corruption at a single stroke, without patience or deliberation, and let come what may! Omar told his son, "Have patience my son! You see, God criticized the drinking of alcohol two times, then He prohibited it. I am afraid that if I impose the burden of truth on the people with a single stroke, they would abandon it just as quickly. Then the law would be a source of strife."[58]

The Caliph wanted to handle things prudently and gradually, and was guided by the Qur'anic example of prohibiting intoxicants. He wanted to lead people toward truth gradually, not rashly. This is the mark of true understanding.

HUMANITY

The Sharia is a humane and universal law. It has been established for the good of man. It raises mankind in stature and encourages and nurtures the human aspects of man's character, while at the same time guarding him from his own bestial instincts. The essence of the human being is a spiritual soul that inhabits a material body. Ritual worship

57. "Sufian al-Tharwi said, 'The Caliphs are five: Abu Bakr, Omar, Othman, Ali, and Omar ibn Abdul Aziz, there has not been another like them.' Al-Shafi'i said the same," Ibn al-Athîr, Muhammad b. Muhammad b. ʿAbd al-Karîm (d. 637/1239), *al-Kâmil fi al-tarîkh*, VI (Beirut: Dâr al-Kitâb al-ʿArabî, 1983), 164. *OJ.*

58. See al-Shâtibî, *al-Muwâfiqât*, II

gratifies human spiritual needs since people are more than flesh and blood.

The Sharia preserves man's dignity, a dignity that was not bestowed on him by a president or a parliament. It is God Who gave this to mankind and made humanity his vice-regent on earth. God commanded the angels to bow to man and mentions this honor in the Qur'an, saying, "We have indeed honored the children of Adam" (17:70). When we look at the legal foundations of the Sharia, we see that it recognizes human dignity from birth to death, and even before birth and after death.

Despite its attention to the spiritual character of man, the Sharia does not neglect his material and physical needs. God urges us to travel to seek His bounty and to work to make this planet a better place to live. The Sharia also sanctions the enjoyment of life's beauties and of the good things that God created. The Sharia recognizes the human sexual urge and its influence on behavior, and so men are permitted to marry women of their choosing so long as they are able to fulfill the responsibilities of marriage.

Not only this, but the Sharia enjoins the whole community to care for these needs. No one in the Muslim community may be deprived of the basic needs of clothing, housing, marriage, and health care. If a person does not have enough money to satisfy these needs, the community helps him. He has a right to money from his family if they can afford to give. He may qualify for zakat, or for help from a special government fund.

The Sharia cares for man as a whole: mind, body and spirit. It commands him to be fair with his body by not exhausting it, not even in worship. The Prophet said, "Surely your body has a right on you."[59] The Sharia established a right to medical treatment also. The Prophet said, "God, glorified and exalted is He, did not create any disease for which there is no cure. Some may know it, and some may not."[60] In caring for the mind, the Sharia requires the pursuit of knowledge and supports this in every way, making earnest study an act of worship.

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59. al-Bukhârî, II (30/55), 245.

60. Ahmad, I, 413.

The Qur'an praises scholars and invites everyone to ponder God's creation of the universe.

The Sharia discourages blind imitation and dependence on supposition, and prohibits all drugs that impair the mind. It commands every human soul to worship God without the mediation of priests or shamans. Everyone holds the key to salvation in their own hand. "Whoever has purified it has succeeded indeed, and whoever has corrupted it has failed indeed" (91:9-10). This is why the five essential interests are the preservation of religion, self, mind, offspring, and property.

When we say that the Sharia is humane, we mean that it applies to all mankind regardless of sex, color, nationality, or class. Even though it was brought by an Arab, and revealed in the Arabic language, it is a universal guidance for all humanity, not an Arab law. It is the law of the God of all humanity, for all humanity, revealed in the universal book, the Qur'an, whose revealer says, "Blessed is He Who has sent down the standard (of right and wrong) to His servant to be a warner to the worlds" (25:1).

The first verse following the invocation of God's name is "Praise belongs to God, the Lord of the Worlds" (1:2). In the final chapter of the revelation, God says, "Say, 'I seek refuge in the Lord of mankind, The King of mankind, The God of mankind..." (114:1-3). With it the universal Prophet was sent, "We did not send you except as a mercy for all beings" (21:107).[61]

Fathi Ridwan believes that universality means that all the inhabitants of this planet make up a coherent and indivisible whole.

> Another deed, another system, or another law may be as humane as the Sharia , but it cannot be as universal. A decision may be made by a village or a tribal chief who, rather than thinking of mankind, thinks only of the village he lives in and governs. Islam is universal because it is humane. It does not make distinctions among people except in piety, abstention from evil, and commitment to good, and does not discriminate between people. The inalienable rights of human beings include freedom and honor.[62]

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61. See also 7:158, "Say (Muhammad) 'Mankind! I am the messenger of God to you all.'"
62. Fathi Ridwân, *Falsfat al-tashrîᶜ al-islâmî*, (Cairo: Dâr al-Kitâb al-ᶜArabî, n.d.), 154-5.

Islam forbids all types of discrimination, whether these are based on race, religion, color or class, and addresses all people, since all people are servants of the One God Who created them. They are all descendants of one man and one woman. The bond that ties people together is their love for God and common descent from Adam and Eve. God says,

> Mankind, fear your Lord Who created you from a single soul and from it created its mate. And from those two, a great number of men and women have spread. Fear God by Whom you make claims on one another, and respect the wombs (that carried you). For God is watching over you (4:1).

How right the word "wombs" is in this verse that addresses all people, and reminds them of the single soul from which they were all created. How right it is when this word is intended to mean, among other things, the general human bond, as the beginning of the verse says. God also says,

> Mankind, we have created you from a male and a female, and have made you into nations and tribes for you to know one another. The noblest of you with God is the most Godfearing. God is All-Knowing, All-Aware (49:13).

This verse does not rule out the existence of races and nations, but it urges people to remember their roots and to be aware of the reason for the differences between them. They should know each other and cooperate with one another, not struggle against each other and fight. The Prophet called on all people to accept one another as brothers and warned Muslims against being arrogant or aggressive toward one another. Brotherhood is such a permanent principle in his Message that he used to beseech God after each prayer saying,

> God, our Sustainer, and Sustainer of everything! I bear witness that you are the One, alone. God, our Sustainer, the Sustainer of everything! I bear witness that Muhammad is Your servant and Your Messenger. God, our Sustainer and Sustainer of everything! I bear witness that all people are brethren![63]

63. Abû Dâ'ûd, II, 83 (no. 1508).

Thus, the three principles which the Prophet repeated at the end of every prayer are:

1. There is only one God and nothing else may be associated with Him in any way. Muslims must deny all other gods.
2. Muhammad is the servant and the Messenger of God. He is neither God nor the son of God, but a human messenger who conveyed the Message of his Lord. He did not act on his own.[64]
3. All people are brothers. There can be no bias, no discrimination, no arrogance, no aggression, no hatred, no envy and no strife between them.

If we understand that God is One God and the Message of Muhammad is accepted, then those who make gods out of themselves on earth will collapse and the oppressed will rise victorious under the banner of monotheism. The bond of worshiping the single God is the only clear basis for the lasting unity of mankind. That is why Prophet Muhammad said, "I bear witness that all people are brethren."[65]

INTEGRITY

Integrity means the working of the parts of a whole in an orderly way toward a common goal. A single and integral entity consists of many parts. These parts must be in harmony with each other. Integrity is at once a natural phenomenon and a legal concept. We can see this integrity in everything that God has created and in everything that He has commanded. Anyone who thinks about the natural world must be amazed by its wondrous harmony. The creation of the heavens and the earth, the creation of man, of animals, of plants, and of all things, defies comprehension. The stars and planets, massive and distant, have for millions of years been plying the skies in their natural orbits. They neither collide haphazardly nor drift aimlessly about. God confirms this and says,

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64. "Say, 'I am only a human like you. My Lord reveals to me that your God is one god. And whoever hopes for the meeting with his Lord, let him do righteous deeds, and associate none in the worship of his Lord'" (18:110).

65. Abû Dâ'ûd, II, 83 (no. 1508).

> A sign to them is night. We withdraw it from the day, so then they are in darkness. And the sun runs on to a point of rest for it. That is the decree of the Almighty, the All-Knowing. And the moon, We have measured it in phases until it returns like a curved date stalk. It is not for the sun to catch the moon, nor does the night win over the day. They each swim in an orbit (36:37-40).

A close look at the Sharia will show that its provisions compliment rather than contradict one another. The Sharia has high regard for women. It cares for the humanity of women and declares that women's religious obligations are the same as those of men. The Holy Qur'an says, "You come from one another" (3:195) and the Prophet said, "Women are the full sisters of men."[66]

The Qur'an's provision that women inherit half as much as men should not lead us to conclude that the Qur'an is unfair to women or diminishes their status in any way. On the contrary, it guarantees each person their due in proportion to the duties and financial obligations they must bear. The Qur'an says, "God orders you concerning your children: to the male the equivalent of the portion of two females..." (4:11).

Islam puts women under men's custody but does not place any financial obligation on them. Before marriage a woman is under her father's or guardian's care. After marriage she becomes the responsibility of her husband who must provide for her material needs however rich she may be. In addition to this, men must pay their wives a previously agreed amount of money upon marriage, which becomes their property. By doing this a man is financially losing while his wife is gaining in many respects.

Let us assume that a man dies and is survived by a son and a daughter. His entire estate is worth three thousand dollars. From this, two thousand would go to the son, and one thousand to the daughter. What is likely to become of each one's share? The son, will probably marry later and might have to give his wife five hundred dollars upon marriage, and with the remaining five hundred furnish a house. In the end, he would have only one thousand dollars, exactly his sister's

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66. Abû Dâ'ûd, Tirmîdhî, Ahmad.

share of the inheritance. The thousand that went to the daughter will remain intact. When she gets married, she could receive a dowry of five hundred dollars from her husband. In this case she would end up with more than her brother's share. The laws of inheritance and maintenance, and the law of dower compliment one another.

This same harmony is reflected in all creation. We see this harmony again when we consider concepts of legal liability. For example, the Sharia did not lay the responsibility for accidental murder upon the killer alone. Responsibility for payment of compensation, known in Sharia law as *diya*, rests with his family. For this purpose, one's family includes most close relatives through the male line, as well as immediate members of one's extended family. Payment of compensation may be made in installments over a period of three years, and each relative will be expected to pay according to his ability. The Sharia achieves a number of its objectives in this way.

It is fair to the killer, who should not suffer excessive financial burden for a crime he did not intend to commit, and it insures that every family bears responsibility for its own members. Control, discipline, and restraint must begin at home: a family that is indifferent to its members' behavior will suffer for their neglect. It insures that compensation reaches the family of the deceased: one man may not be able to pay it alone and in this case the bereaved family risks losing their rights.

Some people may ask why a whole family should bear an obligation to pay death compensation when they had no hand in any wrongdoing. The explanation for this is clear when we consider the principles of the Sharia globally. The same relatives who are collectively responsible for one another before the law also have a collective right of inheritance. This is the right they gain in exchange for the criminal responsibility they mutually bear. By virtue of this family connection poor relations have a claim on their richer relatives' wealth, at least in the view of some scholars. They support this with the verse, "The (father's) heir has to do the same (as the father)" (2:233).

The Sharia clearly links rights to obligations. Each right compliments a duty, and each loss offsets a gain. The loss resulting from the payment of death compensation and the obligation to share responsibility for it is made up for by a right to inheritance. Maintenance, on the other hand, is the right of the incapable against the capable. Thus,

by the law of equity members of the same family exchange rights and obligations, losses and gains, each according to his own situation.

Many people have only a partial understanding of the legal principles that form the foundations of Sharia law. Had they made a careful study of Islamic jurisprudence they would probably have come to different conclusions. The shortsighted, shallow approach of many critics of the Sharia has lead to a serious misunderstanding of it, and to an inability to grasp it as a complete and comprehensive system of law. Anyone who studies the Sharia carefully, who seeks out those who really do know, and whoever tries to understand the principles upon which the law rests, will realize that this is a brilliant body of law that reflects the sublime perfection of its Revealer.

COMPREHENSIVENESS

The Sharia covers the whole range of human activities. It covers the laws of religion and ritual, which pertain to purification, prayer, fasting, pilgrimage, the sacrifice of animals and their proper slaughtering, the making of vows, and many other things that fall beyond the reach of ordinary legislation. It also covers family law, including marriage and its responsibilities, divorce and child custody, the drawing up of wills, the division of inheritance, and other matters that relate to the protection of family life.

The Sharia covers commercial law and regulates business and financial transactions, including different types of sales and the leasing and morgaging of land and property, business arrangements such as partnerships, trusts and pledges, and financial services such as loans. It also regulates speculation, the right to use the property of others, the making of gifts, the procedure for returning lost property, and the fulfillment of commercial and financial obligations. The Sharia sets limits and conditions that must be observed in these dealings and defines practices that must be avoided. Sharia law covers economic and financial affairs and regulates the revenue and expenditures of the central bank or treasury. It provides for assistance to the poor from public funds and from the property of the rich. It also enforces economic prohibitions such as the abolition of bank interest and of monopolies.

Zakat, besides being a fundamental act of worship, is also an important part of the Islamic financial and social system. The Sharia covers criminal law and sometimes prescribes specific punishments, such as

retaliation for murder, amputation of the hand for theft, flogging or stoning for unlawful sexual intercourse, and flogging for drunkenness and slander. In other cases, courts may impose certain discretionary penalties, called *ta'zîr*. The Sharia includes the laws of procedure for such things as the acceptance of testimonies, claims, oaths and concessions, and the qualifications of witnesses. It establishes a correct procedure for the settlement of disputes. The Sharia contains constitutional law to establish the system and rules of government, a procedure for the selection of the head of state, and a procedure for his legal removal. Furthermore, it defines the duties and obligations of the leader to the public, and the obligation of public obedience to him.

Finally, the Sharia includes international law, to regulate relations between the Islamic state and other nations, both in times of peace and of war. This includes the rights of non-Muslims who live within its borders. Classical jurists included this body of law with the rules governing jihad. Modern jurists consider it to be within the domain of international relations.

All these aspects of the Sharia represent an integral part of Islam. This means that these things must be observed and obeyed. It is not permissible for a Muslim to reject any part of the Sharia.[67]

This is why the Qur'an always addresses the nation in terms of these laws—whether they relate directly to God, such as prayer and fasting, or to matters of living and social transactions—and offers guidance in all these matters. When the Qur'an addresses Muslims it says, "You who believe." God has decreed legal principles, which must, therefore, be observed, obeyed and implemented. The degree to which this is done is a measure of each Muslim's commitment to his faith.

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67. "And it is not for believing men or women, when God and His Messenger have decided an affair, to have any choice in their affair. And whoever disobeys God and His Messenger, he indeed has clearly strayed" (33:36). [The author refers here to the Sharia in the abstract sense of divine law, not in the sense of a law based on a human interpretation of the revalation. When he says it is not permissible for a Muslim to reject any part of the Sharia, he means Muslims may not deny the revelation (which includes the Sunna) or its binding nature. As for the opinions of jurists, the author points out more than once that these are not necessarily binding on anyone. *OJ.*]

3

INTERESTS AND THE OBJECTIVES OF THE SHARIA

The Sharia is founded on rules that guide it toward achieving its goals. These rules are logical and understandable, and are never arbitrary. While there are things in the Sharia that we may not fully understand, these are normally confined to ritual practice.[1]

The aim of the Sharia is to protect and maintain the interests of human beings in this world and the next. Scholars have spoken of three kinds of interests, those that insure something vital, those that relieve a burden, and those that improve a situation.[2] This classification of interests is neither supported by the Qur'an and Sunna, nor by the consensus of the scholars. Rather, it is the result of the work of scholars whose concern it was to present the Sharia in a logical and comprehensible way.

The first category of interests—those that insure something vital—relates to things that are indispensable to daily and spiritual life. If these interests were not maintained it would be impossible for man-

1. The purpose of many daily rituals is explained in The Holy Qur'an. For example, at the end of the verse that prescribes *wudu'*, or ritual ablutions before prayer, God says, "God does not want to place a burden on you, but He wants to purify you and perfect His favor to you, that you may give thanks" (5:6). On prayer we read, "Recite whatever of the Book has been revealed to you, and establish prayers; for prayers prevent filth and evil" (29:45). On zakat we read, "Take alms from their wealth to purify them and make them grow by them, and pray for them" (9:103). On fasting we read, "Fasting has been written for you, even as it was written for those before you, so that you might fear God," 2:183. On pilgrimage we read, "To witness the benefits for them" (22:28).

2. See also al-Shâtibî, *al-Muwâfaqât*, II, 6; and al-Ghazzâlî, Muhammad b. Muhammad, Abû Hâmid (d. 505/1111), *Kitâb al-Mustasfâ min ʿilm al-usûl*, I (Cairo: Bulâq, 1322 h.), 286-7. [The three categories of interests mentioned here are: interests that insure something vital, *darûriyah*; interests that relieve a burden, *hâjîyah*; interests that improve a situation, *tahsînîyah*. *OJ*.]

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kind to strike a natural balance in the world: humanity would slide into corruption and degradation in this life, and would have no hope of success or reward in the next.

We can protect these interests in two ways: first, by reinforcing the basic principles upon which they depend, and second, by avoiding actual and potential threats to them. The first category of interests includes six essential objectives: preservation of mind, religion, the inner self, children, wealth,[3] and honor. These are so important that our very existence depends on them. It was for the preservation of these interests that the Quranic sanctions, or *hudûd*, have been imposed. For example, the protection of people from bodily harm is assured by the right of retaliation for unlawful killing. Similarly, intoxicants were prohibited to protect the mind, and apostasy was forbidden to protect religion. The interests of children support the prohibition of adultery. The protection of private property demands the prohibition of theft. The protection of personal honor and dignity lies behind the prohibition of slander. The Prophet ordered us to defend these things above all else. Sa'id ibn Zaid reported that the Prophet said, "He who is killed in defense of his property is a martyr, he who is killed in defense of himself is a martyr, he who is killed in defense of his religion is a martyr, and he who is killed in defense of his wife is a martyr."[4]

The second group of interests are those that relieve a burden. This group includes such things as the possibility of praying while sitting or lying down, and the option, in certain cases, of breaking the fast of Ramadan. These things help us to fulfill our normal obligations.

The final group of interests, those interests that improve a situation, includes things that relate to public life and the development of good

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3. al-Shâtibî was afraid that people would think that wealth was confined to gold, silver, and other forms of money including cash. He opposes this view and says that wealth *(mâl)* "is any kind of property that can be held in exclusive ownership. This includes things such as food, drink and clothes of various description, as well as any other commodity or medium of exchange that can be used to buy these. Such things are the necessities of life . . . Certainly the life of the world is a provision for the hereafter." See *al-Muwâfiqât*, II, 17. *OJ*.

4. al-Albâni, Muhammad Nasr al-Dîn, *Sahih al-jâmi' al-saghir wa ziyâdatihi [al-fath al-kabir]*, V (Beirut: al-Maktab al-Islâmî, 1983), 335 (no. 6321).

character, such as the adoption of good habits and the avoidance of anti-social and self destructive behavior.[5]

Each of these categories complements the one above it. Thus, the lowest category of interests, those that improve a situation, complements the second category, those that relieve a burden, and these in turn complement the highest category, those that insure something vital.[6]

THE GENERAL VIEW OF INTERESTS

According to the Sharia, interests extend from this world to the next and are both personal and communal. The Sharia seeks to balance interests on all levels, whether they relate to individuals or the community, to this world or the next. To reach an equilibrium between personal and public welfare, the Sharia balances temporal and sacred matters, the affairs of the nation and those of humanity, the well-being of this generation and that of generations to come. The task of the Sharia, then, is to achieve harmony and order between mutually conflicting goals. This task is greater than what human beings are capable of alone, whether in terms of knowledge, of wisdom, or of power. This is only natural since people are limited both in knowledge and in reason. Each of us inhabits a narrow world in time and space. We all have our own interests at heart, which we are pushed to promote without regard for the desires or needs of others. Whether or not we are aware of it, our humanity, our belonging to a family, to a community, and to a nation, is itself an obstacle to fairness and the protection of the interests of others. No one can have anything but a narrow view of the problems confronting them and their potential solutions. Much more is hidden from us than is apparent to us, and in our ignorance we may actually do ourselves harm. Only God understands the circumstances each of us face. Whoever rises above himself has been raised up by God.[7]

The Sharia, therefore, aims to protect individual and communal welfare. It protects the whole person, in mind, body, and soul. It protects entire classes of people, rich and poor, rulers and ruled,

5. al-Shâtibî, *al-Muwâfiqât*, II, 11, *passim*.
6. ibid. II, 18.
7. ibid. I, 349.

employers and employees. It protects all humanity, black and white, men and women, and every generation, past, present, and future. Only God is capable of providing comprehensive protection for His creatures' many conflicting needs. To illustrate this, let us look at a well known example from the early history of Islam.

In the days of Omar ibn al-Khattab, Muslim armies entered Iraq. After they had conquered the Sawad, Omar refused to distribute its captured lands among the Muslim soldiers, reversing an established legal precedent.[8] Omar believed that land redistribution in Iraq favored the interests of the present generation at the expense of future ones, and said that if he distributed this land among the Muslims, future generations would get nothing.[9] Omar defended his position before the Prophet's Companions, some of whom insisted that he do as the Prophet had done and distribute the captured lands in Iraq.[10] He cited this verse of the Qur'an to support his position,

> And those who came (into the faith) after them say, "Our Lord, forgive us and our brothers who came into the Faith before us, and do not put any spite in our hearts toward those who believe. Our Lord, You are Pitying, Merciful." [11]

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8. The incident relates to the conquest of the fertile lands of southern Iraq, called al-Sawad. This is a region contained within a triangle formed by the cities of Karbala on the Euphrates, Wasit on the Tigris and extending southward to the confluence of the two rivers at Shatt al-Arab [Bacharach, *A Near East Studies Handbook*, (Seattle, 1974), 57]. The area was known to the desert Arabs both as al-Sawad and al-Rustaq. Both words indicate a heavily populated and cultivated land, and invoke the image of a green fields, trees and date groves. [Yaqût b. ᶜAbdullâh al-Hamâwî (d. 962/1229), *Muᶜjam al-buldân*, III (Beirut: Dâr al-Sâdir, 1979), 272]. *OJ*.

9. See Abû Yûsuf, Yaᶜqûb b. Ibrâhîm b. Habîb al-Kûfî al-Ansârî (d. 182/798), *Kitâb al-kharâj*, (Cairo: Dâr al-Salafiyah, n.d.). 112 (secs. 16, 17)

10. Some of the Companions supported Omar's position. For example, Mu'adh ibn Jabal advised him, "If you divide it, the greater part will fall to the hands of a few who will pass away and leave to one man or one woman, then those who strive in the defense of Islam will find nothing. So bear in mind that this matter concerns those who are with us and those who are yet to come. Abû ᶜUbaid al-Qâsim b. Sallam (d. 224/838), *Kitab al-amwâl*, ed. Muhammad Khalil Harâs (Cario: Dâr al-Fikr, 1981) 57-61; Mu'âdh is reported to have been the most knowledgeable of the Companions in matters relating to the lawful and the prohibited.

11. The Holy Qur'an 59:10; For Omar's interpretation of this verse, see Abû Yûsuf, *Kitâb al-kharâj*, 117, (para. 20).

deal with them on a preferential basis. In the hierarchy of interests, interests that ensure something vital take precedence over those that relieve a burden. Likewise, those that relieve a burden are more important than those that improve a situation. When there is a conflict between two groups of interests the order of precedence is clear.

Interests within a single group are also assigned priorities. For example, within the first group of interests—those that insure something vital—scholars have mentioned six imperatives. Here, the preservation of religion takes priority over the preservation of life, life takes priority over property, and so on. If someone is given the choice between life or property, he would naturally choose life. In the case of being offered life in exchange for one's faith, however, faith must be given priority. This is clearly the case in jihad, where one's life may be sacrificed for the sake of religion. This point appears again in the execution of apostates, where life is the price one pays for abandoning religion.[14]

The same principle guides Muslims to choose a lesser harm if this will help us to avoid what is worse. This principle is illustrated in the Qur'an, in which we are told of Khidr, a companion and teacher of Moses, who sank a boat he was riding in, clearly inflicting damage. Later, he explained to Moses that the boat was owned by fishermen who depended on it for their livelihood. He knew that a local ruler was confiscating all boats of the area and so he sank it to save it for the fishermen, who could recover it once the danger had passed.[15]

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14. al-Shâtibî, *al-Muwâfiqât*, II, 39.

15. The account may be found in The Holy Qur'an 18:64-82: "He said, "This is what we've been seeking." So they returned retracing their steps. Then they found one of Our slaves, whom We had given mercy from Us and taught knowledge from Us. Moses said to him, "Can I follow you so that you may teach me some of what you've been taught of the right way?" He said, "You won't be able to be patient with me."How can you have patience with what's not been within your experience?" He said, "You'll find me, God willing, patient, and I won't disobey you in any matter." He said, "Well if you follow me, don't ask me about anything until I mention it to you." So the two went off till, when they were in the boat, he scuttled it. (Moses) said, "Have you scuttled it to drown its passengers? You've really done something awful." He said, "Didn't I say that you couldn't be patient with me?" (Moses) said, "Don't take me to task because I forgot, and don't overburden me with something too difficult for me." So both went on till, when they met a boy, he killed him. (Moses) said, "What! Have you killed an innocent soul for other than killing another? You've really done something horrible." He said, "Didn't I tell you that you couldn't be patient with me?" (Moses) said, "If I ask you about anything else, do not keep company with me. You've already

According to the principle of priority of interests, when a choice has to be made between doing harm to a single person and harming a larger group, the collective interest prevails over the personal one. This is because the protection of the individual depends on the protection of the community, and if the group suffers, each individual will suffer with it. A single person's interests cannot be preserved by sacrificing the interests of the group since, while he may be protected individually, he would still be exposed to hardship as a member of the group. Therefore, individual harm may be tolerated in order to avoid harming the group since harm cannot be relieved by inflicting its like.

Ibn Nujaim provides many examples of this in his book *al-Ashbah wal nazha'ir*. For example, he mentions the legality of firing at an enemy who has taken Muslims as human shields, of destroying a wall about to collapse into a main street, and of placing restrictions on people who are likely to abuse a position of responsibility. In the name of collective interests a debtor's property may be sold to recover his debts, prices may be officially set for foodstuffs to counter manipulation of the market by businessmen, and merchants may be forced to sell their goods at an official price. Cook-shops may even be banned from areas where drapers and textile shops are concentrated.If the harm caused by a thing is equal to the benefit derived from it, or if it is not clear which of them outweighs the other, then the rule is that avoiding harm is more important than securing some advantage or benefit.[16]

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gotten an excuse from me." So both went on till, when they came to the people of a town, they asked its people for food, and they refused to give them hospitality. And they found there a wall about to fall down, and he repaired it. (Moses) said, "If you had wished, you could have taken payment for it." He said, "This is the parting between you and me! I'll tell you the meaning of what you couldn't be patient with." As for the boat, it belonged to poor people working on the sea, and I wanted to disable it, for there was a king after them taking every (sound) boat by force." And as for the boy, his parents were believers, and We feared that he would be too hard on them in disobedience and disbelief." And We wanted their Lord to change him for them for one better in purity and nearer to mercy." And as for the wall, it belonged to two orphaned boys in the city. Under it was a treasure belonging to them. Their father had been righteous, and your Lord wanted them to reach their manhood and bring out their treasuas a mercy from their Lord. I didn't do it at my own command. That's the meaning of what you couldn't be patient with." *OJ*.

16. Ibn Nujaim, *al-Ashbâh wal-nazâ'ir*, 97, also 100, "If an interest and a disadvantage compete,

When interests conflict, the Sharia first attempts to reach a compromise. If this is not possible it assigns priorities. Here, the general takes precedence over the particular, the public welfare is more important than personal well-being, and avoiding harm is preferable to gaining an advantage. The final consideration is always to promote the public good.[17]

The Revision of Rulings

An awareness of the fundamental objectives of the Sharia leads scholars to revise previous judgements to keep pace with changes of time, place, and situation. This practice dates back to the time of the Prophet who tolerated behavior from some people that he would not tolerate from others. A report going back to Abu Hurayra tells of an Arab who once entered the Prophet's Mosque while the Prophet was there saying:

> "Lord forgive me and Muhammad, and don't forgive anyone else!" The Prophet laughed and said, "You certainly mention many of us in your prayers!" Then the man turned and went to the far end of the mosque, stood with his legs wide apart and started to pass water. When the other Arabs present realized what he was doing, they stood up and called out to him, insulting him. The Prophet did not move or say a word. Then, when the man had finished, he told him "This is the mosque and no one urinates here. It was built for the remem-

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more often than not avoidance of the disadvantage will be given precedence. The Sharia has put more emphasis on prohibitions than it has on obligations. The Prophet said, "Avoid what I have forbidden you, and do as much of what I have ordered you to do as you can" al-Bukâhrî, VI (96/2), 142. Thus it is allowed to fall short of an obligation if this is to avoid inflicting harm. Nevertheless, what is forbidden must remain forbidden, and we must treat these limits with respect, while specially avoiding major infractions, or *kabâ'ir*. This principle is illustrated by a ruling of al- Bazzazi (d. 827/1414) who said, "Whoever does not find the means to conceal himself should not wash after urinating or defecating, even if he is on the bank of a river, since doing somehting that is prohibited is more serious than failure to comply with an obligation..." . [See Muhammad b. Muhammad b. al-Bazzazi, *al-Jâmi'a al-wajiz*]

17. Avoidance of harm is part of the protection of interests. The Prophet said, "There is neither harm nor reciprocating harm in Islam." Based on this hadith scholars draw a general rule that whatever is harmful is prohibited. Ahmad, 1:313, this report goes back to Ibn Abbas. Ibn Taimîya discussed the conflict between benefit and harm in *Majmu'a al-fatâwa*, XX (Riyadh, n.d.), 48-61. Readers will also find a summary of this in Qaradawi, *Awlâwiyât al-haraka al-islâmîya*, (Cairo: Dâr al-Wahbah, n.d.), 202-6.

brance of God and for prayer." Then he had someone pour a bucket of water on the spot to clean it.[18]

Omar's decision not to distribute the newly acquired lands in Sawad was based on his understanding of the aims of the Sharia. He did not feel obliged to do what the Prophet had done, simply because the situation was similar. By the same token, the scholars have repeatedly revised the rules for giving alms due at the end of Ramadan.

Zakat al-Fitr

There is a special tax levied on all Muslims, normally at the end of the month of Ramadan, called *zakat al-fitr*. In the days of the Prophet, this was collected and distributed between the dawn prayer on the first day of Shawal, the month following Ramadan, and the festival prayer on the same morning. In a small community like that of Madinah, the poor were known by name and it was easy to distribute alms to them personally. Later, in the days of the "rightly-guided Caliphs," this special tax was distributed one or two days before the festival because the community had grown larger. Later still, some scholars ruled that this tax could be distributed in the middle of the month of Ramadan. They also said that the staple food of the people could be given, even though this was not mentioned in the Sharia. Omar ibn Abdul Aziz, Abu Hanifa (d. 150/767), and others, later ruled that the value of food could be given in cash. Their argument was that the Prophet said the poor should not have to ask for what they need on the day of the festival. This may be assured by giving cash as much as by giving food. Cash could even be more useful.[19]

When people do not understand the reasons behind the Sharia's rulings they may mistakenly contradict either the letter or the spirit of the law. It is not always easy to see the relationship between the

18. Ibn Mâja, I, 87.

19. In big cities giving charity as cereals, wheat and barley for instance, may cause hardship to both contributors and recipients, and so contradict the objectives of the Sharia. Poor people may not want to eat cereals on a holiday and try to sell these to get money to buy what they need. A glut of several commodities on the market would suppress prices and people would earn little by selling them. Their needs would be denied, and contributors would be embarrassed to see their gifts for sale in the market. This is discussed in more detail in Qaradawi, *Fiqh al-zakât*, II (Beirut: Mu'assasah al-Risâlah, 1981), 915-60.

Sharia's principles and the public interest. A ruling may even seem to contradict interests in some way and lead people to conclude that the Sharia should either be ignored or changed. To illustrate this point we will look at three common questions: inheritance rights, eating with the right hand, and shaving.

Inheritance

Orientalists and Muslim reformers have both criticized the Islamic system of inheritance. According to the Sharia, male relatives on the father's side such as brothers and paternal cousins have a larger share of a man's estate than do wives or daughters. This system reflects the needs of a society based on the extended family. The Islamic system of inheritance takes into account the responsibilities that men bear and their role in insuring public welfare through the extended family. The Qur'an defines other responsibilities toward relatives on the father's side which are also related to inheritance rights. For example, men are responsible for the financial support and guardianship of the orphan children of brothers or cousins, they bear criminal responsibility for paternal kin: if a man's cousin kills someone he must help him pay compensation to the victim's family. Clearly, social responsibility and the right of inheritance are complementary. It would not be fair to deny men their rights to inheritance while still expecting them to bear these responsibilities.

Eating with the Right Hand

Muslims eat and drink using the right hand. The Prophet said, "No one of you shall eat or drink with his left hand, for the devil eats and drinks with its left hand."[20] In another hadith he said, "Invoke God's name and eat with your right hand."[21] Once the Prophet told a man to eat with his right hand. The man told him, "I am unable to do that." The Prophet replied, "Then, may you be unable (to eat with your left hand)." Pride prevented him from eating with his right hand and he could not raise his left one to his mouth.[22]

20. Muslim, III (36/13), 1548 (no. 105-2020).
21. al- Bukhârî, VI (69/3), 196; Muslim, III (36/13), 1599 (no. 108-2022).
22. Muslim, III (34/57), 1599 (no. 107-2021).

There are reasons for eating with the right hand. First, it is part of the common etiquette that gives the Muslim nation its distinctive character and contributes to its practical unity. All nations recognize standards of courtesy and etiquette. Politeness and good manners demand that we eat with the right hand. Secondly, it compliments other rules of etiquette. While the right hand is reserved for eating, drinking, shaking hands, and so on, the left hand is used for dirty things, like cleaning oneself after using the toilet. Finally, the Prophet was careful to teach us to do this and we are required to follow his instructions.[23] Eating with the right hand is a matter of religion and not of personal habit.

Wearing a Beard

Wearing a beard is one of the symbols of Islam and a way Muslims recognize one another, even though the contents of their hearts may differ. Several hadiths say Muslims should distinguish themselves physically from non-Muslims. Growing the beard is part of the Sunna, not a custom or habit, and shaving it is a reprehensible act. The Prophet said growing a beard is part of being a man, and according to the Sharia masculinity, the natural state of manhood, should not be violated needlessly. Masculinity also distinguishes men from women, and women, similarly, must respect their femininity. For the same reason the Prophet prohibited men from wearing women's clothes, and women from wearing men's clothes.

As we pointed out at the beginning of this chapter, the Sharia is logical and reasonable and never arbitrary. Those who criticize it usually do not see it as an integral system of law. To appreciate the Sharia completely, we must understand its aims and the methods it uses to achieve them.

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23. For a discussion of the importance of etiquette in Islam, see Muhammad Asad, *Islam at the Crossroads*, (Karachi, 1975).

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THE FLEXIBILITY OF THE SHARIA

The Sharia is applicable to every place in every age: its remarkable adaptability continues to ensure its universal and timeless relevance. Critics of the Sharia often claim that it is strict, rigid, and incapable of coping with new issues and developments. They imagine that Muslims must submit to it blindly since it is founded in revelation, and since religious books constitute its fundamental sources. They support such criticisms with the Qur'an itself and quote verses such as:

> The words of believers when they are called to God and His Messenger for him to judge between them are, 'We hear and we obey.' And those are the successful (24:51).

> And it is not for believing men or women, when God and His Messenger have decided an affair, to have any choice in their affair (33:36).

Some critics go further and also question the Sharia's status as law. Their premise is that a religious code cannot also be a legal system. These positions, as we shall see, are untenable and ultimately rest upon misinformed arguments, cultural prejudice, and a heritage of fear and distrust.

For Muslims, it is inconceivable that God, the All-Knowing, the Wise, the Beneficent, and the Merciful, would reveal to the last of His Prophets an eternal code of law that would make their religion a burden, worsen their conditions of life, or fail to meet their ever-changing needs. Its Revealer has described it as perfect and designed it to be a blessing and a source of comfort for human beings. He has by no means made it a source of difficulty or discomfort.

The Sharia has always served the Islamic world well, despite differences of nation, culture, and era. Since the time of the Companions it has never been hamstrung or unable to cope with the demands of a changing community. For thirteen centuries it was the only system of law in use among Muslims. Then, under the weight of colonial expansion, Western legal systems were enacted to replace it. These new laws allowed what God had prohibited and abolished what God had ordained.

The Sharia has met the needs of every community it has governed. Since it is the embodiment of wisdom and justice it is well-equipped to solve all problems facing it. While it is true that the Sharia is a religious law, it has never held back the progress of Islamic civilization. On the contrary, it has always been a source of guidance, a milestone on the road to betterment, and a deterrent to corruption and tyranny.

The Sharia is rooted in reason, nature, and reality. It achieves a harmony between rights and duties, between substance and spirit, and between this world and the hereafter. Furthermore, it establishes justice between all people and guarantees the interests and welfare of all. Yet, beyond all of this, God gave the Sharia a remarkable flexibility so that it can be applied to every situation, confront any novelty, and still never struggle for a solution. Why this is, and how it is, forms the basis of the following discussion.

ONE: THE PRINCIPLE OF PARDON

One of the first things that the student of Sharia discovers is that law books deliberately leave an extensive margin of error in which jurists are free to apply their own discretion in pursuit of the welfare of society. Because of this they are able to shape the law according to what they consider to be best and most suitable within the context of their own time and situation. In this, they are guided by their understanding of the objectives and spirit of the Sharia, by legal precedent, and by tradition. This margin of error was deliberately left by the Lawgiver. The Prophet said,

> God the Almighty has laid down religious duties so do not neglect them; He has set boundaries so do not overstep them; He has prohibited some things so do not violate them: about some things He was

silent—out of compassion for you, not forgetfulness, so seek not after them.[1]

The Prophet believed that excessive questioning might eventually lead to more obligations, more duties, and more prohibitions. In another hadith he said,

> Leave me as I leave you, for the people who came before you were ruined by their questioning and their difference over their prophets. If I forbid you to do something, then keep away from it. And if I order you to do something, then do as much of it as you can.[2]

The Qur'an tells us,

> You who believe, do not ask about things which, if they were made known to you, would trouble you. And if you ask about them when the Qur'an is being sent down, they will be made known to you. God left them out, for God is Tolerant, Merciful (5:101).

The Prophet also said, "What God allowed in His Book is permissible, what He prohibited is forbidden, and what He was silent about is forgiven. So accept from God His forgiveness as He does not forget anything," and then he recited the verse, "and your Lord never has been forgetful."[3]

The easing of religious obligations and the creation of a margin of error were not accidental. God built them into the Sharia since He has made it valid for all places, all times, and all situations.

Matters not mentioned in the Qur'an or Sunna

After the death of the Prophet, responsibility for new legislation fell to a group of scholars who were qualified to perform ijtihad. They were responsible for deciding about things that were not mentioned either in the Qur'an or the Sunna. Their rulings reflect a range of opinions, and so offer guidance about matters that would not otherwise be clear to us. Any view that supports the context at hand and

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1. al-Dâraqutnî, *Sunan* IV, (Beirut: ᶜAlim al-Kutub, 1982), 298 (no. 104); *al-Nawawi's Forty Hadith*, tr. Denys Johnson-Davies, (Damascus: 1976), no. 30.

2. al-Bukhârî, VIII, (96/2), 139.

3. al-Hâkim, *al-Mustadrak*, II, 375.

results from the correct use of a recognized method of jurisprudence is acceptable. Among these methods are analogy, *qiyâs*, juristic preference, *istihsân*, and consideration of public interest, *istislâh*.

Analogy

Analogy plays a crucial role in Islamic jurisprudence. By analogy we mean to consider the status of something that is mentioned in the Qur'an and Sunna, and on the basis of a common unifying cause, apply this to something that is not mentioned in either of these sources. Comparisons using analogies should show no significant differences. Jurists know this as *qiyâs*.

For example, when Omar ibn al-Khattab was told that some people owned horses that cost as much as hundreds of sheep he asked, "Do we collect the zakat for every forty sheep, yet collect nothing for horses?" He quickly ordered the collection of zakat for horses, based on an analogy with sheep. This same type of analogical reasoning was later adopted by Abu Hanifa. Using this method, some scholars ruled in favor of payment of the special contribution due at the end of Ramadan, known as *zakât al-fitr*, in the local staple food. They based this position on an analogy with the foods mentiomed in the hadith: dates, raisins, barley, and cheese. It was also by analogy that the penalty mentioned in the Qur'an for slandering married women[4] was also applied to married men, and the phrase "believing women" was deemed to include Christian and Jewish women when it appears in the verse, "You who believe, if you wed believing women and divorce them before you have touched them, then there is no period for you to count. But give them a gift and release them handsomely"(33:49). Similarly, analogy leads us to conclude that the references to trading in "You who believe, when the prayer is called on Friday, hurry to remember God and quit your trading" (62:9), and "Do not urge anyone to return what he has already bought from another vendor so as to sell him your own goods,"[5] also include leases.

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4. Qur'an 24:4, "And those who accuse chaste women but do not bring four witnesses, lash them with eighty lashes... "

5. al-Bukhârî, III, (34/58), 24.

Analogy also supports the prohibition of using gold and silver utensils for storing water, lotions, oils and kohl, since eating and drinking from them had been clearly prohibited by the hadith, "Do not drink from gold and silver cups nor eat from gold or silver plates."[6]

Imam Isma'il b. Yahya al-Muzni (d. 264/878), a companion of Imam al-Shafi'i, said that "Jurists from the Prophet's time to our day have been using analogy . . . they have always agreed that the equivalent of correctness is correctness, and the equivalent of error is error. Nobody should reject analogy, for it amounts to drawing comparisons between like things."[7] All four Imams,[8] and most other scholars, have used it. Much has been written on its nature, principles, conditions, and scope. Sections on it can be found in most law books whatever the views and approaches they take on other matters of jurisprudence.

Juristic Preference

The excessive use of analogy sometimes leads to results that are unacceptable to the Sharia's objectives or that conflict with its principles of moderation and ease. When this happens jurists employ a method called juristic preference, or *istihsân*. There are several types of juristic preference. One is to give precedence to a particular interest over a general ruling arrived at by analogy. Another is to prefer an obscure but significant analogy over a more obvious but insignificant one. A third form of juristic preference is to restrict or selectively suspend a general rule in the light of extenuating circumstances; this is only used in cases where the maintenance of order and the upholding of justice depend upon a special execption of this kind.

Imam al-Shatibi said, "Juristic preference means to apply the stronger of two available proofs. If a general ruling becomes burdensome, or an analogy becomes rigid, then the general rule should be

6. al-Bukhârî, VI, (70/29), 207.

7. Ibn al-Qaiyim, *I'lâm al-muwâqqi'în*, I, 205.

8. The "Four Imams" are the founding Imams of the four Sunni "schools" of jurisprudence, Imam Abu Hanifa, Imam Malik, Imam al-Shafi'i, and Imam Ahmad b. Hanbal. *OJ.*

made specific (that is to say restricted) by any available means. Alternately, exceptions to the analogy should be found."[9]

There are many definitions of juristic preference. Imam al-Shawkani (d. 1250/1832) admits that there is a difference of opinion about what juristic preference is:

> Some say it is a matter of the intuitive knowledge of a consummate scholar that is difficult to express in words. Others say it is a matter of preference for a stronger analogy over a weaker one. Yet others say it is a matter of preference of custom to an established legal precedent or principle, in the pursuit of the public interest. It is said to be the restriction of an analogy by one that is stronger than it. Some maintain that it is to give precedence to a specific interest at the expense of a general principle arrived at by analogy.[10]

Legal evidence is required before any scholar may pass a ruling that is based on anything but the most obvious of analogies. Evidence is always required to support the selective restriction of a general rule. This is why juristic preference has been classified according to the legal evidence used to support it.

Custom provides one such type of evidence. For example, contracts for manufacture, *istisna'*, have no formal basis in Sharia law, nevertheless, the use of such contracts is customary and so they are legally valid. The same applies to the dedication of movable items such as books to an endowment in perpetuity, *waqf*. Necessity provides us with another type of evidence, and so a light splashing of urine does not negate ritual purity and well-water may be considered ritually pure. Interest gives us a third kind of evidence, and so, for example, an employee may be held responsible for property lost in his care. The need to avoid difficulty provides our last type of evidence, thus we may overlook technical "fraud" of a trivial nature in commercial transactions.

To illustrate the idea of juristic preference, let us look at an example from jurisprudence known as *The Case of the Donkey*. A woman died and left an assortment of heirs: her husband, her mother, her half-

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9. al-Shâtibî, *al-Muwâfaqât*, IV, 209.

10. al-Shawkânî, *Irshâd al-fuhûl ila tahqîq al-haqq min ʿilm al-usûl*, (Dâr al-Saʿâda, n.d.), 223.

brothers on her mother's side, and her full brothers. According to analogy, her husband is entitled to inherit half of her estate, her mother receives one sixth, her brothers on the mother's side share a third between them, and her full brothers receive nothing. This is because full brothers are relatives through the male line and are only entitled to what is left after the primary beneficiaries have had their legal share. Here, there was nothing left for them.[11]

Omar ibn al-Khattab's ruling was that the full brothers of the deceased had no entitlement. They objected, saying, "O Commander of the Faithful! What if our father was a donkey, don't we still have the same mother?" Omar considered their question and reversed his decision giving them a share in their mother's estate. Some Companions were later heard to say that even if their father was a donkey, it would not have made any difference. Because of this it was called the case of the donkey.

Ali, Ibn Mas'ud, and Ibn Abbas, believed that in such a case the full brothers would have no share, while Omar, Othman, and Zaid ibn Thabit agreed that they should participate in the half brother's share.[12] Ali's opinion was based on analogy while Omar's was based on juristic preference. Thus, in his concern for fairness and justice, Omar ibn al-Khattab was the first to use juristic preference.[13]

Another example of juristic preference is permission to undress for medical treatment. This is an exemption to the general rule that some parts of the body are pudendal and should not be seen by others. An exemption from this rule is necessary to prevent harm. Similarly, a small margin of error in weighing large items is legal.[14] Juristic preference provides the basis for allowing people of bad-character to testify in court if there are no people of good character able to do so. It also provides support for the common practice of using public baths without first agreeing on how much to pay, how long to stay, and how

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11. The husband gets 1/2 (3/6), the mother 1/6 and the half-brothers on the mother's side 1/3 (2/6); that is, 3/6 + 1/6 + 2/6 = 6/6, or 100 per cent, this exhausts the entire estate. *OJ.*

12. Ibn Qudâma, *al-Mughni*, VII (Beirut: Dâr al-Kitab al-ʿArabi, 1983), 21-23.

13. Muhammad Abû Zahra, *Mâlik*, (Dâr al-Saʿâda, n.d.), 378.

14. Here Dr. al-Qaradawi refers to *ribâ al-fadl*, a kind of interest that is received immediately, usually in bartering. This is normally proscribed. *OJ.*

much water to use. Technically, such details must be specified in contracts for sales and services. Imam Malik said that a person could agree to work for board alone if this lessens his hardship, even though it would be difficult to estimate how much food he would eat.[15]

Consideration of Public Interest

Consideration of public interest, *istislâh*, plays an important role in jurisprudence.[16] According to Abdul Wahhab Khallaf, this is the most effective method of handling non-textual issues. By referring to the public interest, the Sharia can cope with changing demands made upon it.[17] In Islamic jurisprudence, the term *istislâh* means to consider the absolute public interest[18] as valid evidence to support a position about something not covered by any primary source.[19] In every instance of legislation, the Sharia seeks to preserve the public interest.

Most scholars believe that public interest can provide valid legal evidence upon which legislation, legal rulings, or judgments may be based. Law books contain hundreds of examples of this. These examples describe precedents established either by reference to the absolute public interest, or by the need to avoid harm.

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15. al-Shâtibî, *al-Iʿtisâm*, II (Cairo: al-Iʿlânât al-Sharqîya, n.d.), 143.

16. *Istislâh*, the consideration of public interest, is regarded as a basis of law in the Sharia. The jurists of different schools have used different Arabic terms to describe it. The Hanafis call it *istihsân*, meaning equitable preference to find a just solution. Imam Malik calls it *al-masâlih al-mursala* (sing. *al-maslaha al-mursala*), meaning public benefit or public welfare. The Arabic word *mursal* literally means "set loose [from the texts]" and *maslih* means welfare. Imam Ahmad b. Hanbal calls it *istislâh*, that is to seek the best solution with respect to the general interest. The Hanbali scholar Ibn Qudama as well as the Maliki jurist Ibn Rushd have occasionally used the term *istihsân*. The Shafi'is are the only group of scholars who do not recognize *istihsân* as a source of law. According to Imam al-Shafi'i, *istihsân* threatens to open the door to the unrestricted use of fallible human opinions, since the public interest will vary from place to place and time to time. See Abdur Rahman I. Doi, *Sharia: The Islamic Law*, (London: Ta Ha, 1984), 81-83.

17. Abdul Wahhâb Khallâf, *Masâdir al-tashrîʿ* al-islâmî fimâ la nas fîhi, (Kuwait: Dâr al-Qalam, n.d.) 85.

18. *al-Maslahat al-mursala*: the terminology of the jurists is not uniform, see note 16 above. Malaki scholars prefer to use the term *al-maslahat al-mursala* (literally, public benefit or welfare) where Shafi'is and Hanbalis say *istislâh*. This difference of usage is indicated in the text where *al-maslahat al-mursala* is translated as "absolute public interest," and *istislâh* appears as "public interest." There is no significant difference in these two terms which merely reflect differences of usage among scholars. *OJ*.

19. al-Qarâfî, *Kitâb al-furuq*, II (Beirut: Dâr al-Maʿârif, n.d.), 107.

The Companions of the Prophet understood the Sharia better than anyone else. They made extensive use of the principles of public interest and based many decisions upon it. For example, it was the public interest that made Abu Bakr compile a complete written text of the Qur'an, although this had not been done by the Prophet. While Abu Bakr hesitated at first, he went ahead after Omar ibn al-Khattab encouraged him, realizing that this was for the public good and general interest of Islam. Public interest also guided him to appoint Omar ibn al-Khattab to succeed him, though the Prophet had not appointed any successor. When Omar became Caliph, public interest led him to levy a land-tax, *kharâj*, set up an administrative apparatus, incorporate cities, build prisons, and enact a series of discretionary penalties. For example, he destroyed adulterated milk and bound over half the property of local governors who worked in trade and commerce while they were in office.

In the light of public interest, the third Caliph, Othman, established a standard copy of the Qur'an and sent examples of it to all the provinces. Then he burned all records that deviated from it. When a dying man divorced his wife only to deprive her of her inheritance, Othman passed a ruling to guarantee her rights. This, too, was based upon public interest. Public interest motivated Ali to ask Abdul Aswad al-Du'ali (1 before Hijra - 69) to formulate the principles of Arabic grammar. On the same basis, Ali held artisans liable for property they lost while in their care if they could offer no evidence that normal precautions had been taken to safeguard it. He said, "Nothing serves the people better than this."[20] Muadh ibn Jabal used to support his decision to collect textiles in payment of zakat saying, "Bring me *khamis* and *labis*, I will take them instead of wheat and barley. This is easier for you and more useful to the poor in Madina." Mu'awiya used public interest as a basis for his decision to accept two quarts of wheat instead of a gallon of dates for *zakât al-fitr*.[21]

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20. Abdul Wahhâb Khallâf, *Masâdir al-tashrîʿ* al-islâmî fîmâ la nas fîhi, 85-88.

21. al-Qaradâwî, *Fiqh al-zakât*, II, 803, 932; The unit of measure mentioned in the sources is a *mudd*. Edward Lane says in his *Lexicon* that the "*mudd* of the Prophet was one fourth of one *saa*, this was five pints and one third." Lane, *An Arabic English Lexicon*, VII (New Delhi: 1985), 2697. *OJ*.

Public interest led the Umayyad Caliphate to set up postal services, make Arabic the language of administration, mint money, and make other decisions regarding public administration and services. No jurists ever opposed them over these initiatives. In the interests of defense, many Maliki jurists passed judgments in favor of levying taxes on those who could pay them whenever treasury funds were insufficient to support the army.[22] It was public interest that made most jurists allow the killing of a Muslim used by disbelievers as a human shield, so long as fighting was necessary.[23]

Finally, while the sanctity of the dead is legally protected, many jurists allow opening the womb of a dead woman to rescue her unborn baby if it is thought to be alive.[24] In fact, some jurists say this is obligatory since it may rescue a human soul but inflicts damage on only a part of the corpse. According to al-Nawawi (d. 676/1278), this case is similar to survival cannibalism, where a dead body may be eaten to avoid starvation.[25] Here again, the interests of the living are given precedence over the interests of the dead. The aim is to balance interest and harm.

Public Interest in the View of Jurists

Some jurists refused to accept consideration of public interest as an independent source of legal judgments and legislation equal to textual evidence, consensus, and analogy. Imam al-Ghazali (d. 505/1111), for example, thought consideration of public interests was fanciful. Nevertheless, he mentions several cases in which he leaned towards it by linking it to a primary source of evidence:

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22. ibid. 986-7.

23. al-Ghazâlî, *al-Mustasfâ*, I, 294-5.

24. Hanafi and Shafi'i, most Maliki, and some Hanbali jurists permit this. According to the Hanbalis it is not permitted to damage the corpse of a pregnant woman since this is certain to violate the sanctity of the dead and it is likely that her unborn child will be dead also. Imam Ahmad cites a hadith reported by Abu Da'ud which says, "To break the bone of a dead person is like breaking a bone of the living." The response to this is that the breaking of the bones of a corpse in not by any means necessary and can not be in the interests of anyone. Some Hanbali jurists, nevertheless, permit the opening of a dead woman's womb if there is some movement of the fetus within her, since this is evidence of life. In this case, one does not say "maybe it will be alive." Rather one hopes that it can still be saved.

25. al-Nawawî, *al-Majmuᶜa*: sharh al-muhadhab, V (Beirut: Dâr al-Fikr, n.d.), 301-2.

> Whoever thinks that consideration of public interest, *istislâh*, is evidence in its own right is mistaken. Rather we consider such interests to be associated with the Sharia's objectives, which are known from the Qur'an, the Sunna, and universal consensus. Any interest that is not directly concerned with the preservation of one of the Sharia's objectives—which we understand from the Qur'an, the Sunna, and universal consensus—is outside the realm of interests that could have any use as evidence. Whoever uses consideration of public interest as evidence has determined an aspect of the Sharia just as much as someone who uses juristic preference does. Any interest that goes back to the preservation of one of the Sharia's objectives—known to be so from the Qur'an, the Sunna, and universal consensus—cannot be considered to be independent of these objectives. [A decision] based upon this cannot be said to be based on an analogy, *qiyâs*, rather it is based on an absolute public interest since analogy is a specific source of law. As for absolute public interest, *al-maslaha al-mursila*, this is attested to by more than a single source of evidence. Indeed, it rests upon many different sources, so many that they would be difficult to enumerate. These come from the Qur'an and the Sunna, from comparisons of like things, and from precedent... If we interpret interest in terms of preservation of the Sharia's objectives then there is no dispute about it: interests definitely constitute evidence.[26]

It is commonly believed that the use of public interest is peculiar to the Maliki school. However, al-Qarafi (d. 684/1285), a Maliki scholar, said,

> If you examine how the various schools use analogy, [that is] how they compare and contrast [cases], you will find that they are not in fact attempting to draw evidence from a particular comparison or contrast. They are instead considering the unique context of a situation. This is consideration of the absolute public interest and it is common to all schools.[27]

If you read the books of the other schools you will find that hundreds of issues are handled in terms of interest. Although it is true that

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26. al-Ghazâlî, *al-Mustasfâ*, I, 310-311.

27. al-Qarâfî, *Sharh tanqîh al-fusûl*, (Cairo: Maktabat al-Kúliyât al-Azhariya, 1967), 171.

this is more common among the Hanafis and the Hanbalis than it is among the Shafi'is.

Al-Qarafi mentions several cases in which al-Juwaini (d. 478/1085), known as Imam al-Haramain, records rulings in his book, called *al-Ghyath al-imâm*, based on absolute interest, *al-maslahat al-mutlaqa*, and in which he allowed things that not even the Malikis permit.[28] Imam al-Ghazali does the same thing in his book *Shifâ' al-ghalîl*.[29] Both men were Shafi'i scholars and were critical of the Maliki's use of absolute public interest. Imam al-Ghazali established strict rules for its use, laying down conditions that are difficult to meet. He says that the question must refer to one essential interest from the five discussed above.[30] If it refers to a secondary interest, then the absolute public interest may not be considered. In his view, the absolute public interest must refer to something that affects all people. It cannot refer to an individual circumstance, or those of a particular group within a society.[31] Al-Qurtubi (d. 671/1273) said that if it met such conditions, the use of absolute public interest could never be challenged. Ibn al-Munaiyier (d. 683/1284) dismisses al-Qurtubi's conditions as a clever way to support his opinion that no one should ever use absolute public interest as evidence to support a ruling.[32]

The Companions of the Prophet do not seem to have imposed such conditions on the consideration of public interests, *istislâh*, when mak-

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28. al-Juwaînî, *Ghyath al-imam fî tiyath al-zulm*, (Alexandria: Dâr al-Daᶜwa, 1978).

29. al-Ghazâlî, *Shifâ' al-ghalîl bayn al-ashbâh wal-mukhîl wa-masâlik al-ta'lîl*, (Baghdad: al-Irshâd, 1971).

30. al-Ghazâlî, *al-Mustasfâ*, I, 286-7: "As for interest, this essentially refers to the realization of some benefit or the avoidance of some disadvantage. Yet this is not what we mean when we say interest. Indeed, what we intend when we say interest is the preservation of the aims of the Sharia. These can be divided into five categories. The preservation of ones religion, self, mind, progeny and property. Anything that can be related to the preservation of [one of] these five fundamental imperatives is considered an interest. Anything that threatens one of them is detrimental [to the Sharia]. To counteract such threats is also an interest. These five fundamental imperatives are considered to be essential [to the maintenance of the Sharia], they therefore constitute the highest order of interests."

31. Nonessential interests can be divided into two classes: those that aim to relieve hardship, *hâjîya*; and those that aim to improve existing conditions, *tahsînîya*. For a complete discussion of this topic, see Chapter 2 above. *OJ*.

32. al-Shawkânî, *Irshâd al-fuhûl*, 226; ᶜAlî b. Muhammad b. Mansûr, known as Ibn al-Munaiyîr, was Qadî of Alexandira. *OJ*.

ing legal rulings. Omar, for instance, ruled that a woman whose husband had disappeared should wait four years from the date of her petition before being given a divorce, since her husband's death was not certain. Omar's ruling is based on a secondary interest and aims to relieve hardship. It also rests upon an uncertainty: a presumption of death. Omar's view was supported by Othman, Ali, Ibn Omar, Ibn Abbas, and some later scholars.[33]

In a different kind of case, al-Dahhak ibn Qays wanted to construct an irrigation ditch across his neighbor's land, but his neighbor, Mohammed ibn Maslama al-Ansari, refused to allow him to do this. Al-Dahhak told Muhammad, "Will you really prevent me from doing this, even though it will benefit you as well? You will get water from it, and it will do you no harm." Unable to agree, they took the matter to Omar ibn al-Khattab. He asked Muhammad, "Will you prevent your brother from something that will benefit him and be of no harm to you?" Muhammad continued to deny al-Dahhak access to his land. Omar said, "This thing will cross your land whether you like it or not!" Then he ordered al-Dahhak to go ahead and build his irrigation ditch across Muhammad's land, which he did.[34] The history of the Companions and the Rightly Guided Caliphs provides many examples of this type of ruling.

Al-Shatibi does not lay down the same strict conditions as al-Ghazali for the consideration of absolute public interest, but he mentions three conditions of his own.

> An interest should be reasonable in itself and have nothing to do with matters of worship. It should also fit with the general objectives of the Sharia; by this I mean that it should not conflict with any of its basic principles but should be in harmony with its primary aims and objectives to the extent that it is one with them or very close to them. Neither should an interest be bizarre or strange, nor should it rely on peculiar supporting evidence. It should be related to the preservation

33. Ibn Hazm mentions that in such a case a woman could be supported from public funds "like other poor people." He also describes how Ibn Omar suggested that her husband's money be set aside for her use. Omar ibn al-Khattab was presented with a number of cases of this type and decided that such women should wait four years before they re-marry. See Ibn Hazm, *al-Muhallâ*, X (Beirut: Lajnat Ihyâ' al-Turâth al-ᶜArabî, n.d.), 133-6. *OJ*.

34. Ibn Rushd, *Bidâyat al-mujtahad*, II (al-Mu'âhad, n.d.), 31.

> of an essential interest, or to the lifting of some difficulty related to the practice of religion. The preservation of essential interests is always a means to an end and not an end in itself. The lifting of difficulty may be related to an essential interest or it may be related to a secondary one that aims at either improvement or ease.[35]

Therefore, it is not the case, as al-Ghazali maintains, that only interests that insure something vital may be considered as evidence, for an interest that relieves a burden may also constitute evidence. Neither is it true that only general or communal interests may provide evidence since the welfare of individuals and of different social classes is something that is considered by the Sharia. Finally, it is not correct to assume that interests must be definitive and unambiguous before they may be taken as evidence since a reasonable supposition provides ample grounds for the pronouncement of subsidiary rulings. There are many examples of this in books of jurisprudence.

The most important thing to consider, however, is that an interest should be real, not merely imagined. Human whims and desires, supposition and poor understanding, custom and tradition, have always moved people to act in their own best interests or in those of others. Often, however, they are really acting against the very interests they sought to protect. Such action is more damaging than helpful. More often than not, people overlook the public interest while trying to protect a private one. The cost of an immediate advantage is later hardship. A moral loss follows material gain. Major transgressions are committed in the pursuit of some triviality. This is because human beings are strongly influenced by personal and material considerations, by their desire for instant gratification, and by circumstances that affect their ability to think objectively. It is necessary to be cautious and impartial when examining and evaluating interests.[36]

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35. See al-Shâtibî, *al-ʿItisâm*, II, 129-35; and Abdul Wahâb Khallâf, ʿIlm usûl al-fiqh, (Kuwait: Dâr al-Kuwaitîya, nd.), 84-8 and Muhammad Abu Zahra, *Mâlik*, 391, 431.

36. Imam al-Gâzâlî has been criticized for concentrating on one level of interests, that is, interests that ensure something vital, *darûriya*, while neglecting other categories such as those that relieve a burden, *hâjîya*, and those that improve a situation, *tahsînîya*. To define interests in terms of preservation of the objectives of the Sharia is correct, but to confine these objectives to the mere preservation of essentials is not obviously justified.

Imam Ibn Daqiq al-Id (d. 702/1302) said, "I do not oppose whoever takes interest as evidence. However, its identification and regular use requires careful consideration."[37] We should perhaps point out here that rulings based on a specific interest will only remain valid while this interest remains. If the interest supporting a ruling changes or ceases to exist, the ruling must change accordingly, since its validity is dependent upon the conditions, or interests, giving rise to it.

To illustrate this point, let us look at the discretionary punishments and rulings established by the "Rightly Guided" Caliphs, the Companions of the Prophet, and others in response to social conditions of their times. The Prophet himself provides examples of this. He initially prohibited the recording of hadiths, fearing that people would confuse them with the revelation of the Qur'an. Omar ordered the Companions not to talk too much about the Prophet, since this tended to distract them from the Qur'an. This was a decision he took in the light of the particular circumstances of his times. Omar also encouraged people to perform the Greater Pilgrimage without observing the rites of the Lesser Pilgrimage on the same journey.[38] He was afraid that people would neglect Makkah at other times of the year.

According to Ibn al-Qaiyim such cases represent "a specific policy developed in response to changing interests in changing times."[39] It is the subjective nature of local conditions, and peculiarities of time and place, that cause rulings to change. We will discuss this subject in detail a little later.

CUSTOM

Custom is an area where primary legal sources are silent. It is also a rich source of legislation. We mean by custom the things that people are used to, familiar with, and practice with ease and reassurance in their daily lives. Customs can be verbal or active, general or local.

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37. Muhammad b. ᶜAli b. Wahb, known as Ibn Daqîq al-ᶜId, see al-Shawkânî, *Irshâd al-fuhûl*, 226.

38. This kind of pilgrimage is called *hajj ifrâd*; here one only performs the rites of hajj and does not perform the rites of umra, or minor pilgrimage, in the same Pilgrimage season. *OJ.*

39. Ibn al-Qaiyim, *al-Turuq al-hukumîya fî al-siyâsat al-sharᶜîya*, I, (Matbaᶜ al-Sunna al-Muhammadîya, n.d.), 16-8.

For example, verbal custom establishes that fish cannot be called meat; and while the word *walad* in classical Arabic refers to both male and female children, in popular usage it means male children only. Active customs include the practice of selling goods at fixed prices.[40] General customs are what everyone regards as normal standards of social behavior despite differences of social class. Local customs are things that are familiar and commonplace in some countries or within some social groups, but unfamiliar in others, such as commercial customs among businessmen and agricultural practices among farmers.

When Islam first came, the Arabs were living according to various traditional customs and practices. Islam sanctioned those that were compatible with its goals and principles, modified the ones that were partially acceptable to it, and prohibited those that conflicted with it.

There are many things that the Sharia did not regulate directly but left to custom. The amount of money to be spent on women's maintenance is determined by custom since the Qur'an says only, "The duty of feeding and clothing nursing mothers in a fit manner belongs to the father of the child" (2:233). The same is true of indemnity for divorced women, "For divorced women, support out of kindness is a duty for those who fear God" (2:241).[41]

Custom establishes the meaning of *tafarruq*, or parting, in the Prophet's saying, "A transaction is reversible if seller and buyer have not parted."[42] It determines the meaning of *ihyâ'*, or revival, in the hadith, "Whoever revives a dead land is its owner."[43] Custom establishes the meaning of or possession, *hirz*, in theft; the meaning of taking possession, *qabd*, in sales and gifts, just as it establishes many other usages.

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40. Normally prices and conditions of sale should be mutually agreed. *OJ.*

41. Compare: "There shall be for divorced women provision honorable — an obligation on the godfearing" (Arberry, 34); "For divorced women maintenance (should be provided) on a reasonable (scale). This is a duty on the righteous" (Yusuf Ali, 96); "Divorced women should have some provision [made] for them as a duty binding on the heedful" (Irving, 39).

42. al-Bukhârî, III, (34/19), 10.

43. al-Bukhârî, III, (41/15), 70; In Muhammad Khan's translation, "He who cultivates uncultivated land (belonging to nobody) will possess it. . . ." *OJ.*

The Sharia established rules but did not explain them in detail. According to Ibn Qudama (d. 630/1223) and other Hanbali jurists, this means that the details of these rules have been left to the customary practices of people.

Jurists base many of their rulings on custom, and sometimes defend this practice by quoting Ibn Mas'ud, who said "What the Muslims see as proper, is proper before God." Some people believe it was the Prophet who said this, but it is in fact Ibn Mas'ud's own comment.[44]

It is a well known rule of jurisprudence that custom has the force of law. This is reflected in several well known proverbs, "Custom comes from virtue while rules come from restrictions," "Custom is as strong as law," and "What custom prohibits is impossible."

Custom can be seen as a type of interest, since it is in the people's interest to sanction what they have been familiar with for generations. Their dependence on habits and customs means that these have become an important part of their social organization, and that people would have difficulty abandoning them.

Islam is based on the principles of removing difficulties and of making things easy. God reminds us of this more than once. "God wants you to have it easy—He does not want you to have it hard..." (2:185) and, "He has chosen you and has not set you any hardship in the faith..."(22:78). To the same effect, the Prophet said to his Companions, "You have been sent to make things easy, not to make things difficult."[45]

Customs may only be considered as evidence if they do not conflict with a confirmed text or universal consensus, and if they do not harm anyone or indirectly contribute to harm. Customs that conflict with primary sources, which allow what is prohibited or prohibit what is allowed, which introduce heresies or spread corruption and harm among people, are not admissible as legal evidence in any form.[46]

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44. This report has been traced to the Prophet on the authority of Anas but its *isnâd* is defective; see al-ʿIjlaunî, *Kashf al-khafâ' wa-muzîl al-'albâs*, II (Beirut: Mu'sassat al-Risâla, 1983), 245 (no. 2214).

45. Tirmîdhî, I, 99 (no. 147).

46. Abdul Wahhâb Khallâf, ʿIlm usûl al-fiqh, 91.

Finally, rulings that are based on custom will change with the change of custom, both in time and place.

Al-Shatibi mentions men's wearing of caps or hats as an example of a custom that varies from one country to another. He says,

> Attitudes toward men appearing in public bare-headed vary from place to place. In Eastern countries this is not compatible with notions of masculinity, while in the Western lands [of Islam] this is not so. The ruling varies accordingly: In the East, it is objectionable [for men to appear in public bare-headed] while in the West there is no objection to it.[47]

Al-Qurafi explains the need to change with the times and quotes Imam Malik who said, "If a couple argues about who will take possession of the marriage settlement after consummation of the marriage, the final word remains that of the man, though the rule is that the man should not take possession of the settlement." A Maliki jurist, Qadi Isma'il, explains that "This was according to [the] custom in Madina.... Today traditions have changed, and a man does not consummate his marriage until his wife has received her entire settlement. Therefore, the final word remains that of the woman who may dispose of her property as she pleases."[48]

Ibn Nujaim argues the case for local customs. Based on one such custom he says that in some Cairo markets, shop holders are given the right to sell the leases they hold on their shops. Resale of these leases should rest exclusively with the lessee. That is to say, the landlord may neither evict the tenant nor sell his lease to someone else, even if the lease is the property of a religious endowment.[49]

THE NATURE OF RULINGS DERIVED DIRECTLY FROM THE SOURCES

Normally, the Qur'an and Sunna deal only with the basic principles of law, or give only general rulings without going into details of how things should be done. Detailed instructions are given by the Qur'an

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47. al-Shâtibî, *al-Muwâfaqât*, II, 198.
48. Muhammad Abû Zahra, *Mâlik*, 452.
49. Ibn Nujaim, *al-Ashbâh wal-nazâ'ir*, 52.

only if a ruling is intended to be both universal and eternal. For example, we find detailed information in the Qur'an and Sunna dealing with the rituals of worship, regulations regarding marriage, divorce, inheritance, and other features of family law. Details about ritual practices must be given to avoid latter innovation, while details of family law ensure social stability by helping to avoid potential conflicts within the family unit.

In addition to this, there are many areas where the Sharia's position must vary according to time, place, and local custom. Here, the primary textual sources, the Qur'an and Sunna, are usually general and flexible. In this way the Sharia avoids the complications that arise when a minutely detailed system of law is imposed upon people. A finely tuned law may be relevant to one age but not another, it may be suitable for one community but not another, it may be appropriate to one situation but not another.

Consultation

When the Prophet was still in Makkah, the Qur'an established the principle of consultation, *shura*. This was given an importance similar to that of prayer. The Qur'an refers to the Muslims as those "whose business is (conducted) by consultation among themselves..." (42:38). Later, at Madinah, God commanded His Messenger to consult the believers "on business" (3:159).[50] Thus the obligation of the leader to seek the advice of others was established. But what does consultation mean? How should it be done, and what is the relationship between rulers and the ruled? The Qur'an and Sunna have laid down the ruler's obligation to seek advice, but did not give details about how this should be done. This is because every age has its own political culture, every situation has its own circumstances, and every community is unique. These factors affect the way consultation is carried out. Rural people are different from townspeople, the literate differ from the illiterate, and circumstances of peace differ from those of war. Therefore, a single, rigid form of consultation would be a source of hardship and difficulty. God's desire is to make things easy, not difficult.

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50. Compare: Abdullah Yusuf Ali, "in affairs of moment." *OJ*.

People should not be governed by a ruler they did not choose, who does not seek their advice, who rules arbitrarily, and who tolerates no criticism of his actions. In the biographies of the Prophet and of the Rightly Guided Caliphs who succeeded him, various types of consultation are mentioned. These differ according to the circumstances of the times and offer us a choice of the best method to use ourselves: references are made to public referendums of various types, and other forms of public consultation.

Perhaps the most important aspect to consider here is the Sharia's concern to describe the qualities of leadership, expressed in terms of the responsibility the leader bears with regard to the Qur'an and the Sunna. To mention a few qualifications of leadership described by jurists, the leader should be strong and trustworthy,[51] vigilant and knowledgeable.[52] The Sharia also places importance on the qualities of ordinary people who contribute to decision making by lending their voice and support to proposed policies.

When concluding transactions, God says we should "call to witness two witnesses from your men. And if there are not two men, then a man and two women you all approve of as witnesses" (2:282). If acceptability of the witness is a must in buying and selling, just imagine how much more important this is in politics. In case of the reversal of a divorce, God says, "Call two just men among you to witness, and keep your testimony upright before God" (65:2). If this is the case with the smaller community—the family—how can testimony of those not endowed with justice be accepted in the larger community—the nation? Similarly, the Qur'an and the Sunna command us to be just in government, and to govern by what God has revealed.[53]

Justice

How should we observe the command to be just? Should judgment be general or specific? Should it take place on one, or on more than

51. Qur'an 28:26, "Best for you to hire is the strong, the trustworthy."

52. Qur'an 12:55, "He said, 'Put me over the storehouses of the land, for I am a skilled keeper.'"

53. Qur'an 4:58, "If you judge between people to judge justly" see also 5:44,45,47 and 49.

one level? Should a single judge sit before critical cases, or should he be joined by other judges? The Qur'an and Sunna give no details on these issues which have been left instead to the judgment of the Muslims, in the fullness of time.

The Qur'an lays a duty upon all Muslims to call others to what is right and to forbid what is wrong.

> Let there be among you a group who call for good, and order what is right and forbid what is wrong. It is those who are successful, (3:104).[54]

This is supported by much other evidence from the Qur'an and Sunna. These texts do not say how this is to be done. This has been left to the Muslims who should decide for themselves the best way to achieve the goals the Sharia has set for them. Some aspects of the law do not require public participation and are impossible for the authorities to enforce, and so it is up to the conscience of each person to abide by them accordingly. Other aspects of the law may be socially enforced by means of non-governmental societies and associations. Finally, a section of the law must be enforced by executive and judicial authority, or some other kind of government body such as the *muhtasab*, a type of police charged with the protection of public morals and about which much has been written.

The Qur'an does not give us a detailed set of rules. God has instead provided it for our guidance and to help us find a way out of difficulty. This is why the Qur'an emphasizes principles and objectives and rarely addresses means and methods. These are only described when clearly necessary. God intends to provoke the human mind to think and to exercise discretion. Every community, and every generation, may choose a path that is appropriate to it, within the context of the times and in response to the challenges facing it. This freedom has allowed Muslims to organize courts of law, set up new systems of government, and establish various types of police authorities. The Prophet did not assign anyone to the judiciary. He was the one who judged between litigants in his mosque and indeed, any place of his

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54. See also 9:71, "And believing men and women are friends of one another. They order the right and forbid the wrong, and they establish prayer and they pay the poor-tax ...."

choice. His governors and regional emirs, such as Ali ibn Abi Talib, Muadh ibn Jabal, and Abu Musa al-Ashari, were not only responsible for judicial affairs, but also had administrative responsibilities. In Abu Bakr's reign, Omar was in charge of the judiciary, but was rarely required to judge cases since people resorted to their faith and the Qur'an in order to settle disputes. When Omar became Caliph, he made his own appointments to the judiciary. These were men such as Abu Musa al-Ashari, Shuraih, and Kaab ibn Suwar. It was at this time that the judiciary became an independent administrative function and Omar wrote his famous rules on it.

In the times of the Abbasids, the office of the supreme judge came into being. The first chief justice was Abu Yusuf (d. 182/798), a companion of Abu Hanifa. In his reign, Abdul Malik ibn Marwan (r. 65-86/685-705) started to look into grievances and passed rulings by himself. He used to receive complaints from his subjects against some state officials—governors, leaders, and judges—and pass judgment himself.

During the short reign of Omar ibn Abdul Aziz (r. 98-101/717/720), it became more common to investigate complaints and civil courts were consequently set up. Municipal judges assumed functions that distinguished them from other judges since they combined, in the words of al-Mawardi, "the power of the state and the justice of the judge." These civil courts worked like a courts of appeals or administrative tribunals, or what is called in some countries a state councils. Often more than one judge sat on such courts, which some books call tribunals or boards.

Islamic history gives us many examples of judiciary systems. These were the product of historical development. Neither the Qur'an nor the Sunna describe them. The Muslims, in any given time, never hesitated to alter these arrangements. They did not think that changing these things was heresy or novelty in religion because practical organization has nothing to do with belief, worship, or ritual. There is no conflict between the Sharia and any modern judicial system that aims to realize justice among people and to preserve their confidence and peace of mind. For example, judges may specialize in an area such as civil or criminal law, and courts may be organized on a variety of levels: municipal, federal, appellate and so on. God did not commit us to a particular form of judicial system.

Our age has witnessed many developments in criminology and forensic science. Modern techniques of crime detection include the use of fingerprints, voice analysis, comparison of handwriting, and much more. Such developments help to achieve the Sharia's goals. Ibn al-Qaiyim said,

> God did not define a single path to justice, to the exclusion of all others. However, the Sharia makes it clear that His aim is to establish righteousness and justice among people. Any way that leads to righteousness and identifies justice should be considered. We do not pursue means for their own sake. It is the ends that are the true objective. God uses examples to teach us methods so that we may find others like them.[55]

The voluntary control system known as *hisba*, follows the principle of "ordering what is right and forbidding what is wrong." It started simply, and was later specialized and refined. At one point, it included many of the activities now covered by various ministries and government departments: public health, social affairs, national insurance, local government, and traffic police. It also included areas not normally subject to government control such as the observation of religious duties and prevention of cruelty to animals.

There are also many systems of government which Muslims developed to cope with the changing world. Ministries were first introduced in the Abbasid age and received the approval of scholars who later spoke of them as a usual feature of Islamic government. The Muslims experienced two kinds of ministries under a Caliph or Supreme Head of the State; the "Mandatory Ministry," which is similar to the government in the parliamentary system and the "Executive Ministry," which is similar to the government of a modern presidential system.

MULTIPLE INTERPRETATION OF TEXTS

Most evidence from the Qur'an and Sunna may be interpreted in more than one way. This explains the emergence of various schools and trends in Islamic jurisprudence. There were strict jurists such as Ibn

55. Ibn al-Qaiyim, *I'lâm al-muwâqi'în*, IV, 383.

Omar, and lenient ones such as Ibn Abbas. Abu Hanifa was able to make extensive use of analogy and Imam Ahmad could insist upon a literal interpretation of the Qur'an and Sunna. Some jurists depended on methods of jurisprudence in order to discover the Sharia, while others insisted on evidence from hadiths and accounts about the Prophet's companions, *athar*,[56] to support their rulings. To illustrate the wide range of possible interpretations we will quote two examples from the Qur'an and the Sunna, the oath of sexual abstinence, *ila'*, and the practice of price control.

The Oath of Sexual Abstinence

In the Age of Ignorance, if a woman refused her husband something he would sometimes swear an oath not to have sex with her for some time, leaveing her neither a widow nor a properly married woman. When Islam came, it restricted such abstinence to four months.

> As for those who swear to keep away from their wives, they must wait four months. Then, if they change their minds, God is Forgiving, Merciful. And if they decide upon divorce, then God hears, He knows ... (2:226-7).

This prohibits men from harming their wives by swearing to keep away from them for long, or indeterminate periods, and acknowledges the legal right of women to sexual intercourse with their husbands. This also gives women the opportunity to free themselves from men who would harm them by depriving them of sexual relations.

Since the time of the Companions jurists have interpreted these verses differently. For example, some of them believed that if a non-Muslim who is living in a state ruled by the Sharia made an oath like this it would be invalid unless preceded by divorce, since, they said, a non-Muslim's oath by God is invalid. Others disagreed and said that anyone's oath by God was valid, since God said, "As for those who swear to keep away from their wives," and did not restrict this, as al-Razi (d. 606/1209) points out, to Muslims alone.[57]

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56. Some scholars refer to reports of the words and actions of the Companions as *athar*, rather than hadith. *OJ*.

57. See Fakhr al-Dîn al-Râzî, *Tafsîr al-kabîr (mafâtih al-ghayb)*, VI (Beirut: Dâr al-Fikr, 1981), 87.

Anger

Many jurists believed that an oath of sexual abstinence was valid whether or not it resulted from a disagreement. Ali and Ibn Abbas, said that such oaths were valid only if made angrily in the course of bickering and dispute. Al-Suyuti (d. 911/1505), relates that when a man told Ali that he had sworn not to have sex with his wife for two years, Ali told him that this was *ila'*. The man replied that he had done this because his wife was breast-feeding and Ali said, "Then this is not *ila'*."[58]

Al-Suyuti also tells us that Ibn Hammad once asked Ibrahim al-Nakh'i about the validity of a man's oath not to have sex with his wife while she was beast-feeding. Al-Nakh'i said, "I know of no situation in which the oath of *ila'* is valid except in anger. God said, 'Then, if they change their minds.' This means that if their anger passes."[59] Others said that it means if they change their minds and come back to their wives, even if their anger had not passed.

Al-Qurtubi reports that Ibn Sirin believed an oath to be binding even if it was not made in anger. Ibn Mas'ud, Ibn al-Thawri, Malik, al-Shafi'i and Ahmad ibn Hanbal all held the same view. Ibn al-Mufhhir said this was correct since the scholars agree that all other types of oath are valid, whether or not they are made in anger. Al-Qurtubi then adds, "Since the Qur'an supports this [view], we require evidence to restrict it to situations of anger, but this evidence is lacking."[60]

Differences of Opinion about Ila'

Fakhr al-Din al-Razi explains that all opinions about the period of *ila'* may be divided into four categories: (1) Ibn Abbas' view that a man's oath is invalid unless he swears that he will never have sex with his wife again; (2) the view of al-Hassan and Ishaq, who held an oath to be valid for whatever period, even a for single day; (3) the view of Abu Hanifa and al-Thawri, who said that the period of an oath must be for four months or more; and (4) the view of Imams Malik, al-Sha-

58. al-Suyûtî, *al-Dâr al-manthûr fi tafsîr al-ma'thûr*, I (Beirut: Dâr al-Maᶜrifa, n.d.), 270.
59. ibid. 271.
60. al-Qurtûbî, *al-Jâmiᶜ* li-ahkâm al-Qur'an, III, 109.

fi'i, and Ahmad that an oath is invalid unless a period for more than four months is specified.

The reason for these differences is that the verse gives us the waiting period prior to divorce, but does not say how long an oath of sexual abstention should be. Al-Qurtubi explains the views of some scholars in his book *Jami' li ahkam.*

> Ibn al-Mundhir says the meaning of return is return to sexual intercourse if a man is able to do so. If he had an excuse—such as sickness or imprisonment—he could resume sexual relations with his wife even after a long absence since, after all, she is his wife. If for example he had come home from a journey, recovered from an illness, or been released from prison, then there was no longer any reason why he should not have sexual intercourse with his wife. He must then either resume normal sexual relations with her or be separated from her, since the waiting period (for divorce) would be over.
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> Regarding evidence, al-Hassan, Ikrima, al-Nakh'i, and al-Awza'i said that when a man had a legitimate excuse for not having sexual relations with his wife, normal relations were considered to have resumed upon his testimony that this was so. Al-Nakh'i also said that his marital status was restored by testimony, and all oaths were consequently invalid. Ahmad ibn Hanbal said that if a man has an excuse for suspending sexual relations with his wife, his intent to resume sexual relations with her regularizes his marital status. Abu Hanifa added that if a man is unable to perform sexual intercourse he should simply say, "I have returned to her."
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> Another group of jurists said that after an excusable suspension of sexual relations, the only way to restore normal marital status was by sexual intercourse. Sa'id ibn Jubair said that this was (only) true if a man had been traveling or was in prison.[61]

Does a Man's Return to Sexual Relations Break His Vow?

A man, having made an oath of *ila'*, can return to sexual relations with his wife before the waiting period is over. In this case he will not have to divorce his wife but he may owe expiation for his oath. Some scholars said that there is no difference between saying, "By God, I will not talk to you" and then talking to her, and saying, "By God, I

61. ibid.

will not have sex with you" and then having sex with her. They said that since this is an oath, expiation was required for breaking it.[62] Others believed that the breaking of an oath of sexual abstinence is exempted from the normal expiation[63] since God said, "Then, if they change their minds, God is forgiving, merciful." Opponents of this view said the need for expiation is made clear elsewhere in the Qur'an and the Sunna, and that God only mentioned forgiveness and mercy here to draw our attention to exemption from punishment in the Hereafter.[64]

According to Ibn Kathir (d. 774/1373), the first opinion—that expiation is required— is stronger. This is the position supported by Omar, Othman, Ali, Ibn Mas'ud, Ibn Abbas, Ibn Omar, and Zaid ibn Thabit as well as many early scholars such as Abu Hanifa, and his companions, including al-Thawri.

Does Divorce Automatically Follow an Oath of Sexual Abstinence?

As for the words, "If they decide upon divorce, then [let them remember that] God hears, He knows," opinions varied. Does divorce take affect automatically at the end of the specified period of an oath, or is a ruling required from a Sharia court so that when a woman brings her case before a judge he can give her husband the opportunity to choose either to return to her or to divorce her? The Hanafis and a handful of jurists—who drew on accounts of more than ten Companions—said that if a man did not return voluntarily to his wife then he should be asked to divorce her. If he refuses, the judge should carry out a reversible divorce for him.[65]

Ibn al-Arabi (d. 543/1148), a Maliki jurist, said:

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62. al-Râzi, *al-Tafsîr al-kabîr*, VI, 88.

63. al-Qurtûbî says that some of the *tabi'în* (the first generations of the Muslims after the Companions) used to apply this verse generally to any oath to do good deeds in the future. They would not offer any penance for breaking this kind of oath and said that God had not mentioned any penance in the case of *ila'* ... the Prophet said, "He who has made an oath to do something but saw that doing something else was preferable, then let him abandon his oath, since abandoning it is its own expiation," *al-Jâmi' li-ahkâm al-Qur'an*, III, 109-10.

64. al-Râzi, *al-Tafsîr al-kabîr*, VI, 88.

65. al-Qurtûbî, *al-Jâmi'* li-ahkâm al-Qur'an, III, 111.

We understand that the verse means God will forgive their abstinence during the period of the oath, but after this is over they must either return to their wives or divorce them, for "God hears, He knows." The Hanafis believe it means that God will forgive those who return to their wives before the period of the oath expires. If they do not do this their intention for divorce is clear, and "God hears, He knows."

These are equal probabilities. Because of this the Companions considered it carefully. Al-Qurtubi said, "If these were [two] equal possibilities, the opinion of the scholars of Kufa—Abu Hanifa and his supporters—was stronger. They drew an analogy between the [maximum four-month] period of an oath and the four-month waiting-period prior to divorce, called *iddat*. The waiting-period is counted in months and menses. Its length is ordained by God. When it is over, conjugal relations are indisputably terminated and the man shall have no way into the woman's life except with her permission. The same applies to *ila'*, where divorce [automatically] takes place upon expiry of the oath, even if a man forgets [the end of the period] and does not return to his wife. . . and God knows best."[66]

Is Abstention from Sexual Relations the same as an Oath to do so?

Ibn al-Arabi said scholars believed that if a man abstained from sexual intercourse with his wife without any excuse, he should be regarded as having made an oath, even though he had not actually done so. His wife could make a formal complaint to a judge, who would then specify a waiting period from the time of her petition. The intention of her husband to pronounce *ila'* was assumed from his abstinence. Since the effect of the oath is to cause harm by denying the right to sexual intercourse, the oath of abstention does not have to be pronounced explicitly.[67] Al-Qurtubi mentions that "a man who spent two years without having sex with his wife should not be separated from her, but should rather be admonished and told to fear God and refrain from doing her any further harm."[68] Once, when asked about an oath not to speak to one's wife, or pay for her maintenance, or do her any similar type of harm, Ibn al-Arabi said, "While scholars'

66. ibid.

67. Ibn al-ʿArabî, *Ahkâm al-Qur'an*, I (Beirut: Dâr al-Fikr, 1974), 178.

68. al-Qurtûbî, *al-Jâmiʿ li-ahkâm al-Qur'an*, III, 106.

opinions differ, the truth is that this is *ila'* since the aim of it, as we have discussed earlier, is to inflict harm. God said, "But live with them in kindness" (4:19).[69] To conclude, we have now seen a variety of opinions about the meaning of this verse. Despite differences, all scholars remain closely bound to the text and its original objective, which is to prevent men from doing harm to women.[70]

An Example from the Sunna: A Ruling on Price control

Another example, this time from the Sunna, illustrates how a primary text can be interpreted in several ways, some of which are more justified than others. This example deals with commercial law.

Al-Shawkani reports in his book, *Nayl al-awtar*, that Anas said that prices rose in the time of the Prophet and the people said,"O Prophet! Can you not set prices?" He replied, "Surely God is the Sustainer, the Hand of Providence, the Provider, the Determiner of Value. I hope to meet the Almighty without anyone claiming that I have wronged them in any way, neither in property nor in blood."[71] Imam al-Shawkani commented on this and said Abu Hurayra reported on the authority of Ahmad and Abu Da'ud that a man came to the Prophet and said, "O Prophet, set prices!" The Prophet said, "I would rather petition God [for what you require]." Another man came and said, "O Prophet, set prices!" The Prophet said, "God raises and lowers prices."[72] The same account was reported by several Companions of the Prophet and so the prohibition of price control is firmly established.

Price control means that a ruler or government sets specific prices for commodities so that merchants may neither raise nor lower them. According to the evidence provided by these hadiths, prices should be left to the marketplace where normal economic processes will determine the cost of commodities according to the laws of supply and demand. Interference in the freedom of individuals, whether

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69. Ibn al-ᶜArabî, *Ahkâm al-Qur'an*, I, 178.

70. For discussions of jurists see al-Shawkânî, *Nail al-awtâr*, VI, 271-274; Ibn Hazm, *al-Muhallâ*, X, 42-9; and Ibn Qudâma, *al-Mughnî*, VII, 476-511.

71. al-Shawkânî, *Nayl al-awtâr*, V, 232-3; Ahmad, III, 156.

72. Abû Dâ'ûd, III, 272 (no. 3450).

producers, traders, or consumers, is an act of injustice, thus the Prophet explained, "I hope to meet the Almighty without anyone claiming that I have wronged them in any way, neither in property nor in blood."

Many jurists quote hadiths to support the prohibition of price control, saying that it is an act of wrongdoing. According to al-Shawkani, this was the opinion of most jurists who concluded that the people should be given control over their own property. Pricing is their own business. The ruler is enjoined to look after the interests of all Muslims, and not to give consumers' interests in low prices more consideration than vendors' interests in high prices. When interests conflict, the parties concerned should agree on a price. The Qur'an stresses "trade with it by mutual consent" (4:29).

Despite this view, al-Shawkani reports that Malik permitted price control. It seems that this was to protect the interests of consumers (a majority), against the interests of the producers (a minority). The Shafi'i's also allowed price control if prices were unusually high. Others made a distinction between food stuffs and other types of commodities. In later times, most of the Zaidi Imams permitted price control of anything other than human food and animal fodder. Al-Shawkani rejected these rulings, and argued that price control is normally prohibited. He supported his opinion with hadiths that he said should be applied both generally and absolutely. So long as the scope of the relevant hadiths was general, specific evidence was required to restrict their application to certain types of cases or conditions. According to al-Shawkani, no such evidence had been produced.[73]

If we look again at these hadiths we will see that they speak about natural rises in prices, which are not the result of manipulation of the markets or monopoly control of commodities. The Companions said, "The price rose." They did not say, "Protect us from these greedy traders." They did not accuse merchants of any wrongdoing or say they overstepped the limits in pursuing profits, or that they withheld goods from sale at fair and acceptable prices with reasonable profits.

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73. al-Shawkânî, *Nayl al-awtâr*, V, 232-3.

The Prophet told them, "You should rather petition God [for what you require]." If the high cost of living was due to commercial exploitation or fraud, the Prophet would have acted to protect the public welfare. This is what he meant when he said, "Each of you is a shepherd responsible for his flocks and the Imam is a shepherd responsible for his flock."[74] Since price levels were natural and not the result of unfair intervention of producers or suppliers in the market, the Prophet could only advise people to pray to God to lift the burden of high prices from them.

However, in the case of monopolies that control entire markets, or unscrupulous merchants who band together to drive prices up, price control is necessary to protect the weak against the strong. High prices also threaten public order since the poor may be driven by desperation to revolt and take revenge against those who exploit their most basic needs for enormous profits. The Hanafis argued that if the owners of a commodity become greedy and set exaggerated prices, the ruler should set its price in consultation with scholars to avoid public hardship.[75] Ibn Taimiya discussed this point in his book, *al-Hisba*. He said,

> Some price control is unjust and prohibited, and some is just and permissible. Price control may involve compelling people to sell goods for prices that are unacceptable to them, or prohibiting them from the lawful profits that God has permitted them. Any such action is forbidden. On the other hand, price control may guarantee justice between suppliers and consumers, by forcing suppliers to meet their responsibilities to provide goods to the market at a fair price. It may also prevent merchants from wrongdoing and from taking unfair advantage of the market through profiteering. The ruler must exert this type of control. According to the hadith reported earlier on the authority of Anas, price control is prohibited. This evidence is applicable if people are selling their goods in good faith without intending to exploit anyone, even if prices have risen, either because of scarcity of the commodity or because of an increase in demand. These are

74. al-Bukhârî, I, (11/11), 215.

75. Ibn Maudûd al-Mausilî, *al-Ikhtiyâr li'-taᶜâlîl al-mukhtâr*, VIII (Beirut: Dâr al-Fikr al-ᶜArabî, n.d.), 127; See also, Hamilton, trans., *al-Hadayah, a standard manual of Hanafi fiqh*, (Calcutta: 1789). *OJ*.

natural fluctuations. No one can be forced to sell at set prices simply because the market price is high. Price control is obligatory when merchants insist on selling their goods at artificially high prices despite people's need for these goods. In this case, they must sell at a recognized fair price. Price control here is simply making people follow what God has commanded them to do.[76]

Thus Ibn Taimiya not only permitted price control, but made it obligatory for goods and services as well. He also condemned the practice of artificially lowering wages as unjust. He said the ruler should intervene to set fair wages to protect the interests of workers. On the other hand, he said that if skilled laborers agreed to a strike to raise wages above fair levels, the ruler should intervene to protect the interests of employers. This also applies to producers who conspire against merchants and to merchants who conspire against consumers.

The ruler should not support any group against another, rather he should support justice. He should check the dominance of the strong over the weak, whoever the strong or the weak may be. This time the weak may be the vendor or the producer, another time he may be the buyer or the consumer. One time he may be the worker, another time he may be the employer. This is what Ibn Taimiya meant. Thus we see how the Sunna is meant to guide rather than to restrict. When it is restrictive it is only to prevent injustice and oppression.

THE SUSPENSION OF PROHIBITIONS

The flexibility of the Sharia is further illustrated by its handling of special human needs. Generally speaking the Sharia is easy to follow. Normally it is much easier than the heavy and awkward laws it supplanted. God ended the second chapter of the Qur'an with a supplication that says, "Our Lord, do not load us with a burden such as You loaded on those before us!" (2:286).[77] The Qur'an mentions that the scriptures of the Christians and the Jews told of a Prophet who would come to relieve them of hardship. "He allows them the good and disallows the bad. And he relieves them of their burden and the

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76. Ibn Taymîya, *al-Hisba fil-Islâm*, ed. Sayid ibn Muhammad ibn Abî Sa'da, (Kuwait: Dâr al-Arqâm, 1402/1982).

77. See also Ibn Kathîr, *Tafsîr*, I, 338.

shackles that have been on them" (7:157). The end of the verse that prescribes fasting says, "God wants you to have it easy—he does not want you to have it hard..." (2:185). After a verse dealing with marriage, God says, "God wants to lighten the burden for you, for man was created weak" (4:28). At the end of a verse about ritual purification we note, "God does not want to place a burden on you, but He wants to purify you and to perfect His favor to you, that you may give thanks" (5:6). This provides the basis for a fundamental rule of jurisprudence that difficulties should be relieved.[78] This rule makes possible special exemptions for the sick, travelers, and so on. These exemptions must be observed since the Prophet said, "God likes to see you make use of special privileges just as much as He hates to see you defy His commands."[79] There are, for example, special exemptions from the rulings governing purification, prayer, fasting, and pilgrimage. A complete list would be too large to be given here.

Sometimes difficulties are caused directly by a legal prohibition. When this happens it may be possible to temporarily suspend a prohibition.[80] The Qur'an makes exemptions from dietary prohibitions in case of hunger and famine in four different verses. Two of these were revealed at Makkah, in chapters six and sixteen, and two at Madina, in chapters two and five. The Medinan revelations are,

> O you who believe! Eat the good things We have provided you, and give thanks to God if it is He whom you worship. He has forbidden you only carrion, blood and pork, and anything which has been offered to other than God. But he who is driven by necessity, neither craving nor going to an excess, it is no sin for him. It is God Who is Forgiving, Merciful (2:172-3).

> Forbidden to you (as food) are dead animals, blood, pig meat and what has been dedicated to any other than God, strangled, beaten to death, killed by a fall, gored to death and what wild beasts have eaten from, except what you slaughter alive. What has been sacrificed to

78. See for example, Ibn al-Nujaim, *al-Ashbâh wal-nazâ'ir*, 37f.

79. Ahmad, II, 108.

80. There are other guidelines related to this, namely, that what has been permitted out of necessity should not go beyond the absolutely necessary, and "needs," whether general or specific, are to be regarded as "necessities." For further details, see Ibn al-Nujaim, *al-Ashbâh wal-nazâ'ir*, 43-6.

> idols and your swearing by the divining arrows, this is impiety. Today those who disbelieve are in despair of your religion. So do not fear them, fear Me! Today, I have perfected your religion for you, completed My favor to you and chosen Islam as a religion for you. And whoever is forced by hunger, not by will, to sin then truly God is Forgiving, Merciful (5:3).

This second verse confirms the one quoted above, though it gives more details about the types of meat, such as that from animals killed by strangling or beating. The first verse reads, "neither craving nor going to an excess." This is repeated in the second verse in a slightly different form, "not by will, to sin." A person should act according to necessity. When this involves doing something that is normally prohibited, this act must be without intent to violate the limits established by God. It must not be in order to fulfill some personal desire, to violate the rights of others, or to step beyond the bounds of necessity.

Compulsion

Compulsion, like necessity, may sometimes lift a prohibition. Someone who does something against his will is without guilt. The greatest sin a person can commit is to declare disbelief in God, but if a person does so under compulsion he may not be blamed. The Qur'an mentions this and says,

> Whoever has disbelieved in God after having believed—except for whoever has been forced and whose heart is still sure of the Faith... (16:105-6).

The Prophet said, "God forgave my nation for mistakes, for forgetfulness, and for what they have been compelled to do."[81]

Weakness

A necessity may arise because of weakness or frailty. Weakness can lead Muslims to seek the protection or alliance of non-Muslims, an act

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81. Ibn Mâja reported this on the authority of Ibn Abbas but his chain of transmission is weak; Ibn Nujaim quotes al-Suyûtî, who says that it is *hasan*; al-Manâwî, commenting on al-Suyûtî, said that it is a wonderful hadith that should count for half of Islam. Al-Manâwî, *Taisîr sharh al-jâmi'* al-saghîr, I (Riyadh: Maktaba al-Imâm al-Shâfi'î, 1408/1988), 263.

that is normally prohibited. In such a situation, it may appear that Muslims express fondness toward the disbelievers by seeking their help. To seek the help of disbelievers does not imply approval of disbelief, nor is it proof of treachery against Islam. An alliance with disbelievers may be to protect a vital interest. The help of disbelievers may be vital in a conflict with a mortal enemy. God said,

> Let not the believers take disbelievers for their friends instead of believers. Whoever does that is not with God in anything unless you fear them. God warns you of Himself. For God is the (final) journey (3:28).

Despite the uncompromising tone of these words, and despite similar warnings in other verses,[82] God has made an exception for the weak, and permitted them to protect themselves by showing their enemies the face of friendship.

Social Needs and Social Integrity

Just as the Sharia considers necessity a factor to exempt individuals from prohibitions when absolutely necessary, it also considers social and political needs as well. For example, when the Muslims are forced to go to war, they may be permitted to do what is prohibited under normal circumstances.

When they besieged the Jews of Banin-Nadhir, the Prophet and his Companions cut down their palm-trees and burned them to force the Jews to surrender and so protect themselves from further losses. The Jews deplored this and said the Prophet acted wrongfully and violated one of his own prohibitions. Verses were then revealed to explain the Prophet's behavior. God addressed the Prophet and his Companions and said, "Whatever palm-trees you cut down or left standing on their roots, it was by God's leave, and for him to shame the evildoers" (59:5). Some jurists went on to say that when an enemy took Muslims hostages, and used them to shield themselves in battle, Muslims may

82. Qur'an 5:51, "You who believe, do not take the Jews and Christians for friends. They are friends to one another. Whoever of you takes them for friends is (one) of them. God does not guide wrongdoing people" and 58:22, "You will not find people who believe in God and the Last Day loving those who oppose God and His Messenger, even if they are their fathers, their sons, their brothers, or their clan."

still attack them even if this means killing their hostages. This may be necessary if the alternative is to place many more Muslims in grave danger. While Muslims are prohibited from killing other Muslims, and the hostages would have been innocent of any crime, urgency and necessity may suspend normal legal impediments.[83] The necessity of defending the nation, of defending Islam, and preventing the victory of the disbelievers, may override the rights of hostages, whose reward remains with God.

Imam al-Ghazali criticized those who would not accept this. He said that to refuse to act decisively in this situation would amount to killing many more innocent people. We know that the Sharia gives precedence to the whole over the part. Preservation of the Muslim community from the victory of the disbelievers is more important than the preservation of one life. The objectives of the Sharia confirm this.

The same applies to the levying of taxes on the wealthy to fund jihad, supply armies, prepare fortifications, and provide other war-time necessities. This is supported, or rather imposed, by the Sharia, though several jurists do not admit that people should be made to pay more than this. Al-Ghazali says,

> We know that if we must choose between one of two kinds of harm, the Sharia guides us to avoid the greater harm and the most serious evil .... What each man pays (in extra taxes) is negligible in comparison with the potential risk to life and property if the Muslim community is deprived of order and security (through conquest by disbelievers).[84]

This principle also applies to the freeing of Muslim prisoners of war, despite the cost. Imam Malik said, "Muslims should redeem their prisoners, even if this costs them everything they own."[85] This is because the honor of these prisoners is a part of the honor of the nation, and the honor of the Muslim nation is given precedence over the rights one Muslim has over his property.

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83. al-Ghazâlî, *al-Mustasfâ*, I, 294-5.

84. ibid. 303-4; *see also* al-Shâtibî, *al-Iʿtisâm*, II, 121-2.

85. Ibn al-ʿArabî, *Ahkâm al-Qur'an*, I, 59-60.

THE VARIABILITY OF FATWAS

The Sharia is intended to serve the interests of people, to serve the interests of justice, and to protect society from the dangers of tyranny and oppression. This is what we should consider when interpreting legal texts and applying principles of law. This means that jurists should not stick to a single invariable position, constantly referring to it in fatwas, legal rulings, teaching, writing, and legislation, despite changes of time, place, situation, and custom. A global view of the objectives of the Sharia should always be kept in mind when passing judgment on any particular matter.

Scholars such as Ibn al-Qaiyim tell us that "fatwas may change with time, and according to place, situation, local custom, and intention." He has included an interesting chapter about this in his book *I'lâm al-muwâqi'în*. Here he introduces the topic to his readers:

> The changing nature of fatwas is of great importance. Ignorance of it leads to a serious misunderstanding of the Sharia. The result of this is that difficult and impossible things may become obligatory. The Sharia is the guardian of the highest levels of interests and cannot be used to sanction this. The essence of the Sharia rests on wisdom and the pursuit of human interests in the life of the world and in the Hereafter. The Sharia is justice at large, mercy at large, interest at large, and wisdom at large.[86]

Permanent and Variable Rulings

This does not mean that all legal rulings will change with time, or according to place or local custom. Some rulings are permanent and may not be changed whatever the circumstances or conditions. Ibn al-Qaiyim says,

> Rulings, *ahkam*, fall into two categories. Those belonging to the first category take a fixed form and do not change with time or place. These are not subject to the interpretations of jurists and include the rulings on religious obligations, prohibitions, and criminal punishments prescribed by the Qur'an and Sunna. Those rulings belonging to the second category are variable and may change to meet the needs of time, place and situation. Discretionary punishments are included in

86. Ibn al-Qaiyim, *I'lâm al-muwâqqi'în*, III, 14-5.

this category since they rest on a consideration of public interest and welfare.[87]

This position is solidly supported, not only by Ibn al-Qaiyim, but also by many other scholars, such as al-Qarafi and the Hanafi scholar, Ibn Abidin (d. 1252/1836)[88]

Qur'anic Evidence for the Variability of Legal Rulings

What is the evidence from the Qur'an for the variability of fatwas? Ibn al-Qaiyim gave several examples of this from the practice of the Companions, but he never produced any evidence to support it from the Qur'an, nor are we aware of any other jurist who attempted to find such evidence.

A close examination of the Qur'an does, however, reveal evidence to support this important principle, particularly with respect to the category of verses some jurists call "abrogated and abrogating." These verses are not abrogated, nor do they abrogate anything. Each of them was revealed for a purpose and within a specific context. For example, God said in the Qur'an,

> Prophet, urge the believers to fight. If there are a patient twenty of you, they will overcome two hundred, and if there are a patient hundred of you, they will overcome a thousand of those who have disbelieved, because they are a people who do not understand, (8:65).

This is immediately followed by a verse that says,

> Now God has relieved you, for He knew that there was weakness in you. So if there are a patient hundred of you, they will overcome two hundred, and if there are a thousand of you, they will overcome two thousand by permission of God, for God is with the patient, (8:66).

Sheikh Rashid Rida explains these verses saying:

> The least the believers can do against the unbelievers in combat is for a hundred of them to vanquish two hundred and a thousand to

87. Ibn al-Qaiyim, *Ighâtha al-lahfân*, I (Beirut: Dâr al-Maʿarifa, n.d.), 346-9.

88. See Ibn ʿAbidin, *Nashr al-ʿurf fi binâ' baʿd* al-ahkam ʿala al-ʿuruf, in *Majmuʿ risâ'il ibn ʿAbidîn*, II (Beirut: Dâr 'Ihyâ al-Turâth al-ʿArabî, n.d.), 112.

> vanquish two thousand. This describes the situation of weakness for which the special dispensation discussed above was intended, and in which the believers found themselves at the time of the Battle of Badr when these verses were revealed. At Badr, the Muslims were poorly equipped to fight and had only one or two horses. They had gone out to receive a caravan and found a battle ready army that outnumbered them by more than two to one. Later, when the Muslim force was complete and they were resolved to fight as God had commanded them, they fought and vanquished more than ten times their number.[89]

Some scholars believe that the first of these two verses is abrogated by the second. The evidence for this is that the verse says, "Now has God releived you," and offers a dispensation for weakness. These scholars are mistaken since abrogation of something cannot be concurrent with its revelation as a command to be fulfilled.

These two verses were revealed simultaneously. Al-Bukhari reports that Ibn Abbas said the verse, "If there are patient twenty of you, they will overcome two hundred, and if there are patient a hundred of you, they will overcome a thousand of those who have disbelieved," meant that each Muslim should confront ten unbelievers. The second verse, "Now has God relieved you," conditionally lightened the obligation to fight, which remained.

This hadith does not support the position that the second verse repeals the first, as well as the ruling it contains. The first verse establishes that the Muslims must fight when they are strong. The second verse provides an exemption based on weakness. The second verse establishes a ruling for a specific situation, a situation other than that for which the first verse was revealed. This is evidence from the Qur'an to support the variable nature of legal rulings.[90] Al-Suyuti describes how abrogation falls into many categories. The third of these includes Qur'anic rulings made in the context of a changing situation. When they were weak, God ordered the Muslims to be patient and to

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89. Rashîd Rida, *Tafsîr al-manâr*, X (Beirut: Dâr al-Maᶜârif, n.d.), 79.

90. The same applies to the verses dealing with patience, forgiveness, tolerance, and avoidance of unbelievers which most scholars believe were abrogated by the 'verse of sword.' These verses were revealed for their own time and purpose, as was the verse of the sword.

forgive their enemies, but later the Muslims were told to fight. The reasons underlying a ruling may change, and so the ruling itself may also change, but this is not abrogation. Abrogation means the total abolition of a ruling, which then has no legal force at all.[91]

Evidence for the Change of Rulings in the Sunna

Anyone who studies the Prophet's Sunna will find that legal rulings change. In his book, *Talkhis al-hibbir*, Ibn Hajr points this out and quotes a hadith related by Abu Da'ud: "A fasting man asked the Prophet to give him permission to kiss his wife, which he received. Another man came and asked the Prophet for permission to do the same, but was refused. The one he gave permission to kiss his wife was old, while the one he prohibited from doing so was young."[92]

This saying is not reliably supported, *daᶜif*, and cannot be used as proof. It is, however, supported by another account contained in Imam Ahmad's *Musnad*. Ahmad tells us that Abdullah ibn Amr ibn al-As said, "We were with the Prophet when a young man came and asked him "Can I kiss my wife while I am fasting?""

No," the Prophet said.

Then an old man came and asked, "Can I kiss my wife while I am fasting?" "

Yes," the Prophet answered. As we were looking at each other, the Prophet said, "I know why you are looking at each other. The old man controls himself."[93]

Many other accounts show that rulings can change according to circumstances. For example, Salama ibn al-Akwa relates an account according to which the Prophet said, "Whoever sacrifices an animal [on the Feast of the Sacrifice] should not find any of it in his house on the third morning after its slaughter." A year later someone asked him, "Are we to do what we did last year?" He said, "Eat, feed, and save.

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91. al-Suyûtî, *al-Ittiqân fî ᶜulûm al-Qur'an*, II (Beirut: Mustafâ al-Halabî, n.d.), 21.

92. Ibn Hajr, *Talkhîs al-hibbîr*, VI (Cairo: Azhar, 1979), 187; Abû Dâ'ûd, II, 313 (no. 2387).

93. Ahmad, II, 220; Ahmad Shakir said that the *isnâd* of this hadith is *sahih*, despite the fact that it contains the name of Ibn Lahi'a. Ahmad Shâkir, *al-Musnad lil Imâm Ahmad ibn Hanbal*, XII (Dar al-Mᶜârif: Cairo, 1958), 16 (no. 7054).

Last year was difficult for people, and I wanted you to offer help to others."[94]

While most jurists believe that this prohibition was later reversed, like the one about visiting graves, this is not the case. This prohibition was a response to a particular situation and became irrelevant once this situation had changed. Imam al-Shafi'i discusses this in his book, *al-Risala*, and points out that the prohibition on saving meat from the Festival was because of the arrival of many new immigrants at Madina. The Prophet himself explained this saying, "I acted for the sake of those who had only recently arrived."[95] The new immigrants were dependent on the hospitality of others, and so the Prophet forbade saving meat from the Feast of the Sacrifice that year. Once these new arrivals had settled, there was no longer any reason for this prohibition. The Prophet explained this again later when he said, "I had forbidden you to save meat from the [Feast of the] Sacrifice. Now eat, feed others, and save."[96] Clearly, rulings can change to take account of new situations.

Imam al-Qurtubi argues that this earlier ruling had not been overturned. He said,

> The ruling no longer applies since the reason for it has changed. There is a difference between reversing a ruling (abrogation), and not being able to apply it because there is no longer any reason to do so. Something that has been reversed, or revoked, has no legal force. Something that is not applicable in one situation may come into force again if the situation demands it.[97]

The "Rightly Guided Caliphs" noted this point. For instance, once in his sermon before the Festival Prayer on the Feast of the Sacrifice, Ali ibn Abi Talib prohibited people from saving meat for more than three days and reminded them that the Prophet once forbade this. Those who thought that the Prophet's earlier ruling had been overturned were confused and some of them said that perhaps Ali had not

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94. al-Bukhârî, VI, (73/16), 239.
95. The hadith is also reported in Ahmad, VI, 51.
96. Ibn Mâja, II, 205 (no. 2558/3160).
97. al-Qurtûbî, *al-Jâmi'* li-ahkâm al-Qur'an, XII, 47-8.

heard that this had been reversed, but Imam Ahmad later explained that this proved Ali knew that it was sometimes possible to save this meat, and that, like the Prophet he invoked this prohibition because of hard times. Ibn Hazm (d. 456/1064) said the three day limit was in response to a certain situation. If peoples' needs can only be met by distributing all of the meat from the Festival, then none should be saved, not even for a single night.[98]

So we see that under certain circumstances the Prophet prohibited the saving of meat from animals slaughtered for the Festival of the Sacrifice, while in a different situation he gave different instructions. And as we saw in the beginning of this section, the Prophet sometimes gave different answers to the same question. Each person got the answer that suited his situation. For example, someone once asked the Prophet for general advice. He said, "Don"t become angry.'[99] Later, when someone else asked him for advice he said, "Say: I believe in God and then be upright in all you do."[100] Later still, he said, "Be careful of what you say."[101] Each of these people got an answer to fit his own situation.

There are many sayings that speak of the merits of jihad. According to these, nothing can equal jihad except for impossible deeds such as perpetual prayer and fasting. Yet, Abu Hurayra reports that when the Prophet was asked, "What is the finest of deeds?" He answered, "Faith in God and his Prophet." Someone then asked him, "Then what?" He said, "Jihad in the path of God." Again someone asked, "Then what?" He replied, "A Pilgrimage accepted by God."[102] According to this, jihad is the finest deed after faith. Bukhari reports that A'isha said, "O Prophet! Since jihad is the best of deeds, should we not then go?" He said, "No, for women the best jihad is an accepted Pilgrimage."[103] When the questioner was a woman, the Prophet's answer changed.

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98. Ibn Hajr, *Fath al-bârî*, XII (Beirut: Mustafâ al-Halabî, n.d.), 120-5.
99. al-Bukhârî, VII, (78/76), 100.
100. Muslim, I, (13/62), 65.
101. Abû Dâ'ûd, IV, 124 (no. 4343).
102. al-Bukhârî, II, (25/4), 141.
103. ibid.

There are many more examples of this to illustrate how a ruling can be different depending on who asks the question. If this is so, how much will they change with time and place?

Precedents from the Time of the Companions and the Rightly Guided Caliphs

The Companions and the Rightly Guided Caliphs made extensive use of rulings. They often changed them to suit changing situations. There are many examples of this but we will quote only a few of them here.

Punishment for Drunkenness

In the time of the Prophet there was no specific punishment for drunkenness, and discretionary punishment sometimes took the form of a rebuke. Al-Bukhari relates that Utba ibn al-Harith said, "A man called Nu'man or Ibn Nu'man was brought drunk to the Prophet. The Prophet was angry and told those who were in the house to beat him, so they beat him with palm branches and sandals. I was among those who took part in this."[104]

There is a another hadith in *Sahih al-Bukhari*, narrated by Abu Hurayra who said "A man was brought drunk to the Prophet who said, "Beat him," so we beat him; some with their hands, some with their shoes, and some with their cloaks. As he was leaving some of them said, "Let God bring shame unto you!" The Prophet told them, "Do not say that. Do not back the devil against him."[105] Using sandals for such beatings is not usual for mandatory penalties, *hudûd*. In another account, Ibn Shihab was asked how many stripes the Prophet prescribed for drunkenness. He answered, "The Prophet did not impose a specific punishment. He used to order those who were around to beat the man with their hands and shoes. When the man cried out, 'O Prophet! Enough,' he would have them stop."[106]

According to reports passed down by Abu Da'ud, al-Nasa'i, and Ibn Hajr, the Prophet did not always beat people who drank alcohol. Ibn

104. al-Bukhârî, VIII, (86/4), 13-4.

105. al-Bukhârî, VIII, (86/4), 14.

106. al-San'anî, *al-Musannaf fil-hadîth*, VII (Beirut: al-Maktab al-Islâmî, 1403/1983), 377.

Abbas said, "A drunken man was being taken to the Prophet, but as they approached al-Abbas' house, this man rushed to impose himself upon al-Abbas' hospitality. When the Prophet was told about it he laughed and did nothing else."[107] Al-Tabari (d. 380/1000) reports a case like this, also on the authority of Ibn Abbas. He says, "The Messenger of God did not flog drunkards until later. At the time of the battle of Tabuk a man came by the Prophet's room drunk. The Prophet said, "Someone should take him by the hand and lead him where he should go."[108]

Apparently, because of the Arabs' recent experience with drinking, the Prophet treated drunkenness leniently at first. When the Sharia was finally established he beat and flogged drunkards, but still did not specify a punishment. According to most narrations, he punished drunkenness with about forty stripes, sometimes more, sometimes less. For example, Anas said that the Prophet used to have drunkards flogged "about forty" stripes, but he can give us only an approximation.

Al-Baihaqi (d. 458/1066) said drunkenness was more common during the caliphate of Abu Bakr than in the time of the Prophet, peace be upon him. Abu Bakr used to ask, "What if we impose this and that." He was careful to stay near to the practice of the Prophet, so he never exceeded forty stripes.[109]

When he was Caliph, Omar ibn al-Khattab consulted people about flogging for drunkenness. He complained that people were drinking audaciously. The drinking of alcohol could result in slander, since drunks are given to mindless gibbering. Ali said, "If someone gets drunk he talks irrationally, and if he talks irrationally he slanders, so his punishment should be the same as that of slander." Ali, as well as Omar, flogged drunkards eighty stripes (the mandatory punishment for slander).[110] Thus, punishment for an offense could rely on the reasonable assumption that it would occur. When Khalid ibn al-Walid

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107. Ibn Hajr, *Fath al-bârî*, XV, 77.

108. ibid.

109. al-Baihaqî, *al-Sunan al-kubrâ*, VIII (Beirut: Dâr al-Fikr, n.d.), 320.

110. al-Sanᶜanî, *al-Musannaf fil-hadîth*, VII, 378; al-Baihaqî, *al-Sunan al-kubrâ*, VIII, 321; Ibn Hajr, *Fath al-bârî*, XV, 67.

wrote to Omar to complain that people were engrossed in drinking and had become indifferent to punishment, Omar sought advice about what to do. According to Imams Muslim and al-Nasa'i, Abdul Rahman ibn Auf told Omar, "The lightest penalty is eighty stripes." Omar then flogged drunkards eighty stripes.[111]

Abdul Rahman ibn Hammam relates a report from Ubaid ibn Omair who says,

> They used to beat drunkards with their hands and sandals: this was done in the time of the Prophet, of Abu Bakr's Caliphate, and also during the early part of Omar's rule. Since Omar was afraid that drunkards might die from severe beatings, he limited the punishment to forty stripes at first. When this did not stop people from drinking he made it sixty stripes. When they persisted he made it eighty stripes and declared this to be the minimum penalty [according to the Qur'an].[112]

Ibn Hammam agreed that eighty stripes is the minimum penalty permitted by the Holy Qur'an. This is lighter than penalties for adultery or theft.

Sometimes Ali punished drunkenness with more than eighty stripes. He flogged the poet al-Najashi al-Harithi eighty stripes for his drinking during the day in Ramadan. He held him until the next day and then flogged him another twenty stripes. Ali said, "I flogged you twenty [more] stripes for your boldness against God and your breaking the fast in Ramadan."[113] Other sources say that Ali preferred not to impose more than forty strokes.

Omar flogged and exiled those who drank during Ramadan since this represented a serious violation of the sanctity of the Holy Month. Once he flogged an old man who drank alcohol during the day in Ramadan eighty stripes and exiled him to Syria.[114] This shows that punishment can vary with the situation of the criminal, his physical fitness, his reputation, his persistence, and his indifference to punish-

111. Abu Da'ud and Nasa'i. The hadith is on the authority of ʿAbdul Rahmân ibn Azhar as reported in Ibn Hajr, *Fath al-bârî*, XV, 67.

112. al-Sanʿanî, *al-Musannaf fil-hadith*, VII, 377-8.

113. al-Sanʿanî, *al-Musannaf fil-hadith*, VII, 382; al-Baihaqî, *al-Sunan al-kubrâ*, VIII, 321.

114. ibid.

ment. Past offenders may be more severely dealt with than those who are not normally of bad character. Omar ibn Abdul Aziz said, "The more persistently people break the law, the more severely they will be punished."[115]

Although Ali ibn Abi Talib advised Omar to flog drunkards eighty stripes, he only flogged them forty stripes himself.[116] There is no contradiction here since neither the Qur'an nor Sunna specify the punishment for drunkenness. It is, therefore, a matter of discretion. Ali might have seen people of his time keeping away from alcohol and so decided to impose the lighter punishments of earlier times under the Prophet and Abu Bakr.

Imams Bukhari and Muslim report that Ali said, "I would not feel responsible for the death of anyone upon whom I had passed judgment, except for the drunkard. If one of them dies from a beating I have ordered, I will pay his family compensation, *diya*, since the Messenger of God left us no instructions (of an appropriate punishment)."[117]

The actions of the Companions prove that the Prophet did not set a particular punishment for drunkenness. If he had done this they would not have resorted to consultation and personal opinion to settle the matter, and they would not have drawn analogies between drinking and the slander. Because they did not find any evidence to establish a punishment for drinking alcohol their rulings changed over time and according to circumstances. This is why Omar flogged drunkards forty, sixty, and, when they were persistent, eighty stripes.

Al-Tabari and others quote several scholars who said that there was no established punishment for drunkenness, and that this was a matter for the discretion of the courts. Ibn Abbas and Ibn Shihab say that the Prophet used to decide the number of stripes according to the situation.[118]

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115. Ibn Hajr, *Fath al-bârî*, XV, 76; al-Dâraqutnî, *Sunan*, III, 157.

116. This is reported in some narrations, though others dismissed it as baseless.

117. al-Bukhârî, VIII, (86/4), 14.

118. Ibn Hajr examines the evidence to support an obligatory penalty for drunkenness; see, *Fath al-bârî*, XV, 77.

In *al-Durar al-bahiya*, Imam al-Shawkani said, "He who drinks an intoxicant of his own free will, should be flogged, forty, less than forty, or more than forty stripes, even with a shoe, according to the discretionary ruling of the Imam." This view was confirmed by Siddiq Hassan Ali in his commentary on al-Shawkani.[119] He reviewed al-Shawkani's evidence and concluded that the punishment for drunkenness properly belongs among the discretionary punishments, or *ta'ziz*, and not the obligatory punishments. It is also clear that Imam Bukhari agreed with this view. Ibn Hajr points out that Imam Bukhari did not give any explanation about a particular number of stripes, nor did he report any hadith regarding this.[120]

In conclusion, the Companions made several decisions about how to punish drunkenness. These varied from time to time and from one situation to another. The Qur'an and Sunna do not set any specific penalty for drunkenness. Rulings specifying punishment for drunkenness may change according to circumstances.

Zakât al-Fitr

Zakât al-fitr is the tax due from all Muslims at the end of Ramadan. This should be distributed to the poor on the Feast of the Sacrifice, the festival day that marks the end of the fast.

The Prophet set a mandatory contribution of one *saa* of dates, raisins, barley or cheese. Nonetheless, several Companions reported that later a half gallon of wheat was considered the equivalent of one gallon of dates or barley.

Ibn al-Mundhir said that there was no solid information about the amount of wheat that should be given, since wheat was not generally available in Madina. It became commonly available in the time of the Companions and they thought that half a gallon of it was equivalent to one gallon of barley.[121] Abu Sa'id al-Khudri said,

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119. See Siddîq Hasan b. ʿAlî, *al-Rawda al-nadiya (sharh al-durar al-bahiya lil-Shawkânî)*, II (Beirut, Dâr al-Maʿrifa, 1398/1978), 283-4.

120. Ibn Hajr, *Fath al-bârî*, XV, 78-80.

121. See Yûsuf al-Qaradâwî, *Fiqh al-zakât*, II, 935-6; Ibn al-Mundhir narrated, on the authority of Othmân, that half a *saa* of wheat was given as *zakât al-fitr*.

> We used to give away a gallon of provisions: dates, barley, raisins, or cheese, for *zakât al-fitr* when the Prophet was with us. We did this until Mu'awiya came to Madina. He said that half a gallon of wheat was the equivalent of one gallon of dates and people then acted according to what he said.[122]

The Companions, Ibn al-Mundhir, and others, sanctioned half a gallon of dates for *zakât al-fitr*, although since the time of the Prophet it had been usual to give one gallon. In their time wheat was more expensive than other foods like barley and dates. To take account of this, they suggested half a gallon of wheat to equal one gallon of a cheaper staple food.

Zakat on Horses

Imam Ahmad and al-Tabarani (d. 260/873)[123] related how some people from Syria came to Omar asking to pay taxes on their horses and slaves. They said, "We have new wealth, horses and slaves, which we would like to purify." Omar told them, "I will do what my two companions did before me." When he consulted the Companions, Ali said, "This is fine if it is not considered tribute, and taken from them once you have gone."[124]

Abdul Razzaq ibn Hammam and al-Baihaqi both tell the story of Abdul Rahman ibn Umaiya who once bartered a hundred young she-camels for a horse. Later the vendor, a Yemeni, changed his mind. He went to Omar and said, "Ya'la and his brother robbed me of my horse!"

Omar had Ya'la brought to him to explain. Omar asked, "Is it true that you pay so much for horses? I did not know that a horse would cost as much as this. We collect zakat on every forty head of sheep but don't collect anything for horses. From now on, we'll collect one dinar for every horse."[125]

Accounts do not confirm which of these incidents happened first, but they probably happened in this order. In the first account, Omar

122. al-Tirmîdhî, II, 91(no. 668).

123. Sulaiyman b. Ahmad b. Ayub, an important early scholar of hadith. *OJ*.

124. Yûsuf al-Qaradâwî, *Fiqh al-zakât*, I, 229.

125. ibid. 226.

hesitated to do something that the Prophet or Abu Bakr did not do. First he consulted the Companions and then accepted the advice of Ali. The second account does not say that he asked anyone. The appropriate action was perfectly clear to him. He decided on the basis of what he had seen and heard, and ordered his officers to collect one dinar on every horse. Later he changed his mind about zakat on horses. He did not feel obliged to stick to his first decision because the circumstances had changed. When he was asked about this discrepancy he said, "That was according to what we knew then, and this is according to what we know now."

"Those Whose Hearts Have Been Reconciled"

During his Caliphate, Omar decided that zakat should no longer be given to those who were known in the Prophet's and Abu Bakr's times as "those whose hearts have been recently reconciled." He said, "God has invigorated Islam and enriched them!" This was not a reversal of anything in the Holy Qur'an and Sunna, nor was it meant to exclude this class of people forever as beneficiaries of zakat. It is not possible to speak of abrogation, the Revelation already having been completed. How could Omar and the Companions reverse anything the Qur'an and the Sunna had established?

Omar did not see any need for further reconciliation, *ta'lif al-qulub*. He prevented the use of this as a pretext for taking zakat. It is the responsibility of the ruler to allocate this money to those who qualify for it in consultation with scholars. The ruling about this may change from time to time, and from one situation to another.

Omar's Ruling on Triple Divorce

Ibn Taimiya mentions Omar's decision to accept the validity of a triple divorce pronounced at a single time, although he knew that this should count as only one, reversible divorce.[126] When Omar saw men commonly using the triple divorce he decided to punish them by accepting it. He thought that when men realized that if they declared a triple divorce they would be irrevocably separated from their wives,

126. Ibn al-Qaiyim, *al-Turuq al-hukumiya*, 16-7; and *I'lâm al-muwâqqi'in*, III, 41.

they would then stop doing this. The Companions supported Omar in this. Omar explains, "People now take lightly actions that they used to consider seriously. Let us hold them to their word."

Omar saw that making this kind of divorce legally valid was the best way to protect public interests. He knew that this kind of divorce was considered a simple divorce in the time of the Prophet and Abu Bakr, and he had treated it like this in the early part of his own Caliphate. Later, people overstepped the limits and started to tamper with God's Revelation.

Distribution of Captured Land

Land that the Muslims captured during their early conquests had been distributed among those who participated in the campaigns. This practice was challenged during Omar's Caliphate. Bilal and several other Companions thought that the newly conquered lands to the north should be distributed among those who conquered them. They said the Prophet had done this at Khaybar after it was taken from the disbelievers and that this position was supported by the general meaning of the verse, "And know that whatever you plunder, a fifth of it is for God" (8:41). They said it was understood that the other four-fifths were for the conquerors. Some reports however state that the Prophet distributed only half the land at Khaybar and that he left the other half as an endowment.

Omar and some other Companions, including Ali and Mu'adh, thought conquered land should be left in the hands of its owners if they paid a land tax, *kharaj*. This policy would serve the interest of all Muslims, then and in days to come, and would provide an endowment for posterity. Omar did not need to redistribute captured land in the rural areas of Iraq, nor indeed in other countries he conquered, and later Caliphs followed the same practice.

As for the Prophet's re-distribution of captured land at Khaybar, it is reported, as we mentioned earlier, that this affected only half the land at Khaybar while the other half was left as an endowment, *waqf*. In the early years of Islam, the pressing need for farm land meant that re-distribution was in the best interests of the Muslims. Later, the situation changed. It became preferable to earmark all captured land for religious endowments. Omar said, "Had it not been for later generations, I would have distributed the land as the Prophet did at

Khaybar." He endowed the land, though he knew that this was not what the Prophet had done. He said that the Prophet's action at Khaybar had not set a legally binding precedent, since it was based on interest.[127] At Khaybar, the Prophet acted in the interests of the state, of which he was head.

The Prophet's example may show that something is permissible. It does not, however, prove that it is obligatory. This is why Omar and his companions did not follow the Prophet's example this time.

The Sharia never sanctions anything that contradicts the interests of the community. Omar, Ali, Mu'adh and others who shared their views, felt that the interests of the Muslims were best served by endowing captured land. This is clear from their arguments and from the evidence they offered to support them.[128]

Omar's Rulings in the Year of Famine

In the Year of Famine, known as *Am al-Ramada*, Omar passed two important rulings. First, he postponed the collection of zakat on livestock, such as camels, sheep, and cattle, until rain fell and sufficient pasture was available. Abu Ubaid records in his *Kitab al-amwal*, that Ibn Abi Diyab said, "When rain fell, (Omar) told me to collect two-years" zakat, distribute one year's contribution, and bring the other year's contribution to him." He did not write off zakat that year, but deferred its collection so that people would not be put into further difficulty. His second important ruling that year, was to suspend punishment for theft.[129] According to Abu Ubaid he said, "There shall be no amputations in the year of draught." Ibn al-Qaiyim reports that Omar said,

> A hand shall neither be amputated for a palm-tree, nor in a year of famine.
>
> Al-Sa'di said, "I asked Ahmad ibn Hanbal about this hadith and he said, 'A bunch of grapes forsaken, a palm tree overlooked, and the year was that of the famine.'"
>
> "Do you support this view?" I asked.

127. Abû Yûsuf, *Kitâb al-kharâj*, 132, para. 41.

128. ibid, 117-35 passim.

129. Abu ᶜUbaid, *Kitâb al-amwâl*, 374, 559.

"Do I support what?" he said.

"That if a person steals something during a famine, he should not have his hand cut off."

"No," he said, " I don't." And he added, "Only if he is desperate and driven by hunger."[130]

Al-Sa'di explains that this is similar to another incident. Two slaves belonging to a man called Abdul Rahman ibn Hatib stole a she-camel belonging to someone from Muzaina. When they were taken to Omar they confessed their guilt. Omar sent for Ibn Hatib. When he arrived he was told

Two (of your) slaves have stolen a camel belonging to someone from Muzaina and freely admit their guilt.

Then Omar told Kathir ibn al-Salat to go and cut off their [right] hands. But no sooner had he said this than he called them back and said, "By God, if I hadn't known that you use them and starve them to the point that they may eat what God has forbidden them, I would have cut off their hands. Now that I have not done so, I will, by God, fine you painfully."

"How much do you want for your camel?" he asked the man from Muzaina.

The man said, "Four hundred [dinars]."

Then Omar told ibn Hatib,"Go and give him eight hundred."[131]

Ibn al-Qaiyim says Imam Ahmad agreed with Omar about suspension of a punishment for theft during a famine. This ruling is consistent with the general principles of the Sharia and depends upon analogy. In times of famine, people may have to steal to survive. It is the responsibility of the wealthier among them to sell them food cheaply or distribute it free of charge. This is to prevent people from stealing what they need. Anyone who is able should give food away as an act of charity. Under these circumstances, the penalty for theft is suspended. The legal evidence for this is particularly strong. The public may even negotiate with owners of large stores of food to get what they need to survive. During a famine, it is difficult to distin-

130. Ibn al-Qaiyim, *I'lâm al-muwâqqi'în*, III, 22-3.

131. ibid.

guish between those who steal out of necessity and common thieves. Because of this the punishment for theft may be suspended. This is what Omar did, although the sources tell us that if he knew they were not in dire need of what they had stolen he would still cut off the hands of thieves.[132] Omar did not really suspend punishment, but he took an additional factor of doubt about motives into account. If a thief's motive was in doubt, the prescribed punishment was no longer thought to be obligatory.

The Recording and Collation of the Qur'an

The first collation of the text of the Qur'an into a single document occurred during the Caliphate of Abu Bakr. At the time of the Prophet the Qur'an was first memorized, and then recorded using whatever materials were at hand. Palm branches, flat white stones, bones, and pot shards we used since paper was not normally available. The Prophet did not have the Qur'an written down completely because it was revealed to him in small portions and as the occasion required. He continued to receive parts of the Revelation until shortly before his death. The time had come for The Qur'an to be collected and published. This new situation required a new response.

The first uprising against Islam happened when Abu Bakr was Caliph. Many Companions who had memorized the Qur'an were killed in the fighting. Seven hundred perished in the Battle of Yamama alone. Omar went to Abu Bakr to suggest that the Qur'an be written down while the men who could testify to its authenticity were still alive. These were Companions such as Ubay, Ibn Mas'ud and Zaid, who had learned the Qur'an from the Prophet, upon whom be peace. Abu Bakr hesitated at first. He told Omar, "How can I do something that the Prophet did not do?" But Omar answered him saying it was a good thing.

Abu Bakr said that Omar continued to press for this until God brought it into his heart. He then went to the Prophet's scribe, Zaid ibn Thabit, and asked him to collect and record the Qur'an. Zaid hesitated and asked,

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132. ibid.

"How can you do something that the Prophet did not do?"

"By God, it is good," said Abu Bakr.

"I continued to resist this," Zaid said, "until God brought into my heart what He had brought into Abu Bakr's heart."

Zaid gleaned the Qur'an from the hearts of those who had memorized it and collected items on which it was written. He then wrote it down and gave it to Abu Bakr who kept it until he died. When Omar became Caliph, he received Othman's manuscript of the Qur'an. This was finally passed on to Omar's daughter Hafsa.[133] This Qur'an was not for general use; it was an official copy to be preserved for reference when necessary. The recording of the Qur'an was undoubtedly a great event in the history of Islam. God guided the Companions to it since their purpose was to preserve the Qur'an. God said, "It is Us Who have revealed the reminder, and We indeed are the Guardian of it" (15:9).

By the time of the third Caliph, Othman ibn Affan, Islam had spread far beyond the Hijaz. Many of the Prophet's Companions had gone to settle in the new territories and people began to bicker about how the Qur'an should be read. Their differences widened and they increased in narrow-mindedness and in stubbornness. Hudhaifa reported that people from Syria and people from Iraq were brought together at the time of the Armenian campaign. There they began to argue and each party claimed that what they had been taught was correct. They bickered and quarreled, insulted one another, accused one another of disbelief, and so each party disowned the other. Hudhaifa was so concerned at what he saw that when he returned to Madina he went directly to see Othman, even before he went to his own house.

"Rescue this nation before it has perished."

"From what?" asked Othman.

"It is the Book of God," he said. "I was on the last campaign and there the people of Syria, Iraq and Hijaz had gathered," and he told them what he had seen.

"I fear that they will argue over their Book just as the Jews and the Christians have done."[134]

133. For this account see al-Qurtûbî, *al-Jâmi' li-ahkâm al-Qur'an*, I, 43; and al-Suyûtî, *al-Ittiqân fî 'ulûm al-Qur'an*, I, 57.

Othman decided to record a standard copy of the Qur'an and to send an example of it to all the provinces so people would have a reference by which to settle their differences. This would protect them from disagreements and fighting.

When he gathered the Companions and asked for their opinion, they agreed to abide by his decision. Othman then ordered Hafsa to send her copy of the Qur'an to be transcribed then returned to her. Hafsa did this and then Othman assigned Zaid ibn Thabit, Abdullah ibn al-Zubair, Sa'id ibn al-As, and Abdul Rahman ibn al-Harith ibn Hisham to record a fresh copy. Othman returned the original to Hafsa, distributed the new copy and ordered all other examples to be burned.[135]

Imam al-Qurtubi said, "Othman did this after having gathered and consulted the *muhajirin*, the *ansar* and the representatives of the Muslims. His proposal was to collect and record the Qur'an as it had been received from the Prophet, peace be upon him. All variations to the text were to be abandoned. They were in total agreement with this, may God bless them all.[136]

The recording of a master copy of the Qur'an and burning all previous ones had been dismissed by some people as something new. They said it was an innovation in the accepted practice of the Muslims. Ali came to the defense of Othman and supported his action. Swaid ibn Ghafala reports that Ali said, "O people! Fear God and do not exaggerate this matter. They say, "Othman, the burner of the Qur'an!" By God, he only burned these things before our eyes. We are the Companions of Mohammed, upon whom be peace." Ali later said, "If I were ruler, I would have done the same as Othman did."

Othman did not depart from the path of his predecessors because he merely wanted to be different. He did this because his times were different from the times of Abu Bakr and Omar. When discord and rebellion among the Muslims seemed imminent, Othman moved to collect the Qur'an and rally the Muslims around it. Thus, the ruling

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134. al-Bukhârî, VI, (66/3), 98-9.

135. al-Qurtûbî, *al-Jâmi*ᶜ li-ahkâm al-Qur'an, I, 44-5.

136. ibid.

about the recording of the Qur'an changed with the change of time and situation.

Ibn Abbas' Ruling about the Murderer's Repentance

Ibn Abi Shayba related that a man came to Ibn Abbas and said, "Is there any repentance possible for someone who killed a believer?" His answer was, "No, to the fire of Hell!" Those who were sitting with him said, "What is this ruling, what is the matter with you today?" He said, "I thought he was angry, intending to kill a believer." They sent someone after the man, who found him trying to do just that.[137]

Ibn Abbas saw this man was angry and intended to kill someone. He only wanted Ibn Abbas to give him the chance to do this. Ibn Abbas blocked his way by telling him he could not repent. Had he seen in his eyes an image of a man deploring what he had done, he would have opened the door of hope for him.

According to Sa'id Ibn Mansoor, when scholars were asked about murder, they usually said no repentance would be possible, but when asked about someone who had already killed they said he should repent. Many jurists followed Ibn Abbas. They were as lenient as possible with those who had already committed some crime, yet were very stern with those had not yet committed any offense. They took the same approach with men who swore, "If I do not do such-and-such, I will divorce my wife," and then broke their oaths, even though some early jurists considered this type of divorce invalid.

Change of Ruling in the Early Years of Islam

The early years of Islam give us many examples of changes in rulings. When he was governor of Madina, Omar ibn Abdul Aziz used to accept a single witness and an oath, in cases brought to him. Later, when he went to Syria, he did not accept less than two witnesses because he thought the people there were less reliable than those in Madina. The same applies to Abu Hanifa, who accepted the testimony of a single witness of proven good character. His companions, Abu

137. Ibn Hajr, *Talkhis al-hibbir*, IV, 187.

Yusuf and Mohammed suspended this to prevent people from lying.[138]

The Hanafi jurists explain the different policies of the Imam and his two companions and say that times were different and that both opinions were correct. Later Hanafi jurists also acted differently from their Imams. There are many cases like this, and changes are usually explained in terms of differences of time and situation. Ibn Abidin wrote in his famous epistle *Nashr al-urf*,

> Many rulings may change over time according to the customs of a people with the emergence of a necessity, or because of a change for the worse among the people themselves. If rulings become rigid, people may face difficulties, and the Sharia's principle of making things easy and avoiding harm will be contradicted. That is why we sometimes see scholars of a particular school depart from their Imam's opinion. He based his ruling on the needs of his own time. They may argue that, if the Imam knew their situation, he would say what they said, drawing on the principles of his own school.[139]

Al-Qarafi said a ruling founded upon a habit that changed, or upon a custom that no longer existed must be changed. Al-Qairawani (d. 386/966), gives us a good example of this in an important book on Maliki jurisprudence, *al-Risâla*.[140] He said that when a wall of his house collapsed, he brought a dog and tethered it to the wall to keep burglars away. Some people told him that Malik would not approve of this. He said, "If Malik were here today, he would use a ravenous lion." We can find examples of this in every school, which provides further evidence of the flexibility God has built into His Sharia, which is suitable for every time and place.

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138. ʿAlî Hasab Allâh, *Usûl al-tashrîʿ al-islâmî*, (Cairo: Dâr al-Fikr al-ʿArabî, 1982), 84-5.

139. Ibn ʿAbidîn, *Majmuʿ al-risâ'il*, II, 125.

140. al-Qairawânî, *al-Risâla*, (Cairo: al-Jamalîya, n.d.), II, 414.

5

WHY WE MUST LIVE BY THE SHARIA

Muslims believe that the Sharia must apply to all aspects of life. In the Qur'an, Chapter Two, God says, "Fasting has been written for you" (2:183), and "requital is written for you in the case of those killed" (2:178). In the same chapter, He says, "O you who believe, fear God, and give up whatever usury remains [due to you], if you are believers" (2:278). In the fifth chapter of the Qur'an we read, "You who believe, when you stand up for prayer, wash your faces, and your hands up to the elbows, and wipe heads and [wash] your feet up to the ankles" (5:6), and "As for the male thief and the female thief, cut off their hands" (5:38).

The words "judge between them" in the following verse clearly address Muslims. God says,

> And judge betwen them by what God has sent down, and do not follow their desires, but beware of their seducing you from some part of what God has sent down to you (5:49).

In another place the Qur'an denounces those who do not rule by the revelation and calls them disbelievers, wrongdoers, and truly wicked. While this apparently refers to the People of the Book—the Jews and Christians—who were the recepients of previous revelations, it is really meant as a warning to Muslims, since the Qur'an was in fact revealed to them.[1] While God criticizes the People of the Book for not judging by what was revealed to them, common sense tells us that this criticism is for the guidance of Muslims. It is unreasonable to

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1. The Holy Qur'an 5:44, 45, 47; "Whoever does not judge by what God has sent down, those are disbelievers . . . they are wrongdoers . . . those are truly wicked."

believe that God would describe Jews and Christians as disbelievers, wrongdoers, and truly wicked for abandoning God's Revelation to them, yet leave the Muslims free to desert the Qur'an.

SUITABILITY OF THE SHARIA TO ALL TIMES AND PLACES

Muslims believe that the Sharia is applicable to all times and places. There is firm evidence of this from the Revelation, from history, and from present reality. Many people who oppose the adoption of Islamic law today cannot bear to hear Muslims say this. They usually raise two objections. Firstly, they say human nature changes according to the conditions of people's lives. Secondly, they believe any universally applicable system of law must be impossibly rigid.

Humanity is not constantly changing. Change occurs in life styles, culture, and technology, not in the essence of humanity. If we compare people's lives in the past with their lives today we will see many dramatic changes yet humanity is still essentially the same. Human nature does not change.

Did humanity change with the splitting of the atom? Are people fundamentally different today from a thousand years ago? Perhaps we should ask about the essence of humanity, not about how we live or what we know about the world. From the time of Adam, the father of humanity, man has remained essentially the same, with the same needs and desires. The Qur'an mentions those needs in the story of Adam.

> You will not go hungry or naked there, or thirst or suffer the heat there (20:118-9).

In the Twentieth Century and beyond, we cannot do without the guidance of God that ensures progress, preserves human nature, and protects humanity from the evil of its own making. We will continue to need religion to teach us the secrets of existence. We will need ritual to nurture the soul and link us to God. We will need morals and virtues to mold good character and guide behavior. And we will need realistic laws to establish standards of justice between us. Even as we reach the Moon and Mars, we will still need divine guidance to plan for the future, to shape our relations with one another, to move us to do what is right and to prevent us from doing wrong. Divine guidance commands us to be just, kind hearted, and charitable to friends and

relations. It forbids us indecency and rebelliousness. We will continue to need protection from usury, theft, bribery, fraud, drugs, alcohol, gambling, adultery, and sexual perversion. We will remain in need of strengthening our relationship with God by being steadfast in prayer, in need of fortifying our relationships with people around us by giving charity, and in need of enlarging our understanding of the universe through the pursuit of science. We will remain in need of deterrents to prevent us from from encroaching upon the rights of others and overstepping the limits God has imposed on us. The luxury that surrounds us today, and the possibilities that are open to us, only increase the need for us to be thankful to our Lord and responsible towards His creation.

It is appearance that changes in man, not essence. The Sharia deals with us on an essential basis. It charts the constant features of our lives. Anyone who questions the applicability of the Sharia to all times and places should consider the fact that it is the mind God created for man, and the knowledge He called on people to acquire, that lead us to discover the eternal essence of man; the unchanging human nature that underlies the constantly transforming tapestry of our lives.

PERMANENCE AND CHANGE IN THE SHARIA

The second objection that opponents of the Sharia raise is that the Sharia is static. This charge, too, is rooted in misunderstanding. Islam represents the final revelation to mankind. It is the completion of all that was revealed before. The Sharia accommodates change because God intended it to be permanent. This is part of its miraculous nature and stands as proof of its universality and eternal authority. We can understand permanence and change in the Sharia if we think of its permanent aspects in terms of ends, and of its changeable aspects in terms of means. While the fundamental ends of the law are unchanging, the means for achieving them are not. While religious and moral values do not change, material culture and technology do.

Now, you might ask why Islam was made the way it is. Why did God not make it either absolutely flexible or absolutely rigid? Islam matches human nature to the nature of creation. In the natural world many things never seem to change even over thousands of years. Sky is always sky, and earth is earth. Night follows day in an unending progression. Yet, much of nature is constantly changing. New islands emerge from the sea, old lakes dry up and new rivers cut their courses.

Water floods the land and then recedes. The dead earth comes to life and deserts disappear beneath green meadows. Rich land turns to dust and is picked up and carried away by the wind. While it is true that change is a fact of life, it is also true that it takes place on a foundation of permanence. Some ancient philosophers thought development and change were eternal laws. Others believed that the basis of all existence was permanence. We know that permanence and change work together. It is not surprising that the Sharia combines factors of permanence with factors of change. Thanks to this, the Muslim community can develop while remaining true to its values.

The permanent aspects of the Sharia ensure the survival of the Muslim community. This not only preserves its internal social stability but also protects it from becoming fragmented into smaller potentially rival groups and from assimilation into alien societies. The permanent aspects of the Sharia are a source of continuity and stability in law, and inspire public confidence in government. Under the Sharia, political and social fashions are unable to endanger the public welfare or threaten the economic health of the nation. Change is also essential if Islamic society is to assimilate developments brought by new times and modern lifestyles without sacrificing any of its essential qualities.

Permanence is reflected in the Qur'an and Sunna, in the Sharia, and in Islamic history. Permanence is manifest in its original, conclusive textual sources, the Qur'an and the Sunna.The Qur'an is the original constitution, and the Sunna is the theoretical explanation and practical demonstration of it. These together constitute a flawless, divine source that Muslims must accept, "Say, 'Obey God, and obey the Messenger'" (24:54).

Flexibility is a characteristic of the discretionary sources of law which are derived from the activities of judges and legal scholars. Scholars frequently disagree over the use of these sources. Some tolerate them while others restrict them. Some depend heavily on them while others hardly use them at all. Discretionary sources include among other things consensus, analogy, and consideration of public interests.

Legal tradition, including the rulings of the Companions and precedents established by jurists in the past make up another kind of discretionary source. An examination of the rules of the Sharia will reveal that these fall into two classes. The first is concerned with things

that contribute to the permanence of Islam, while the second is concerned with aspects of flexibility and change. Permanence is characteristic of the five basic beliefs: belief in God, in His Angels, in His Books, in His Apostles, and in the Last Day. These are mentioned in more than one verse in the Qur'an.[2] Permanence is characteristic of the five pillars of Islam: bearing witness that there is no god other than God and that Muhammad is His Messenger, regular performance of the prayer, giving alms to the poor, fasting the month of Ramadan, and performing the Pilgrimage. According to the Prophet these make up the foundation upon which Islam is built.[3] Permanence is characteristic of the prohibition of murder, adultery, usury, bearing false witness, theft, backbiting, and slander. It is characteristic of fundamental virtues like honesty, trustworthiness, patience, sincerity, and modesty. Permanence is a characteristic of law, which regulates marriage, divorce, inheritance, and criminal responsibility for unlawful killing. The Qur'an, the Sunna, and consensus, confirm these things, and they are rock solid. No human authority may change any one of them. According to al-Shatibi "[Such principles] are complete and eternal, they form the basis of human society, and are the guardians of the interests of Creation."[4] The complement of permanence is flexibility. This is generally associated with specific rulings and theoretical law.

DOES THE SHARIA PLACE ANY LIMITATIONS ON MAN?

Those who oppose the adoption of the Sharia as a system of law in modern times deny its eternal and universal validity. We have already discussed the first part of their argument, that human beings are

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2. Qur'an 2:177, "It is not piety for you to turn your faces towards the East and the West. But pious is he who believes in God and the Last Day and the angels and the Book and the Prophets" and 4:136, "He who disbelieves in God, His angels, His Books, His messengers and the Last Day, he certainly has gone far astray."

3. The Prophet said, "Islam is built on five [pillars], to bear witness that there is no god but God and that Muhammad is the Messenger of God, to establish prayer [at its appointed times], to give the poor-due, to perform the Pilgrimage and [to complete] the fast of Ramadan" al-Bukhârî, I, (2/2), 8).

4. al-Shâtibî, *al-Muwâfaqât*.

constantly changing while the Sharia is static. Now let us turn to the second part of their argument.

Opponents of Islamic Law believe it places unreasonable limitations on human beings and condemns them to an unchanging and unchangeable pattern of life. They argue that the Sharia was established within a specific historical context. If it is binding for all time, then the best that people can do with it is to try to re-interpret the textual sources of the law in every age. The general outline for the unfolding of all human activities will remain clearly defined and delimited.

According to this view, the vice-regency of humanity over the earth is contradicted by a rigid and static law. This law directs and controls human development to such an extent that it is necessary for human beings to break away from its constrictive force to fulfil their very function of vice-regency. This argument depends on the previous premise, that human nature is constantly changing.

The first assertion—that the Sharia cannot be eternally and universally valid—must be rejected since it conflicts with the universal consensus of the Muslims. Indeed, this question never even occurred to Muslims. The eternal and universal validity of the Sharia is clear from the Qur'an and Sunna. Evidence for it is so abundant that one hardly need ask about it.

The second assertion—that the Sharia represents an unreasonable limitation—must also be rejected. The obligation to observe the Sharia does not mean that unreasonable limitations have been placed on people. Nor does it mean that the pattern of their lives will be cast forever in stone. This would be true if the Sharia had sought to direct every tiny detail of human activity. The truth reveals that this is not so. The Sharia has left many things to human reason. Many problems require us to think in order to arrive at a solution. These include many ordinary problems of everyday life. The wide margin for error discussed above is meant to encourage Muslims to use their minds. The Sharia gives details of the universal and eternal concerns of all societies. At the same time it speaks generally about issues that vary from place to place and from time to time. The unchangeable things in Sharia law are confined to general principles. These are outlined in the Qur'an and Sunna and concern the basic structures of Islamic society. For example, the Qur'an has spelled out the details of family law to protect the family as a social unit.

Sharia rulings are frequently open to more than one interpretation. These may depend upon the opinions of scholars which in turn rest upon evidence taken from the Qur'an and Sunna. Generally speaking, we may accept or reject the opinions of scholars. The Sharia tolerates a range of opinions and this gives it a creative and dynamic character. Overriding necessity and the need to avoid hardship can also affect rulings. God intends ease for His servants and does not wish to put them into any difficulty. The Sharia is not meant to impose restrictions. Instead, it represents milestones on the road. Its purpose is to guide, not to direct.

Finally, it is not strange in the least that the Sustainer of mankind would establish laws for human guidance. This is not surprising when we consider that human beings are subject to the laws of nature. We must accept these on trust and in good faith. Many things remain in the hand of God. Life and death, sickness and health come from Him. We are subject to periods of wakefulness followed by periods of sleep. Hunger and thirst move us to eat and to drink. Youth glides into maturity and old age. Thus the cycle of our lives inevitably progresses and no one may ever escape from it.

Natural laws govern the whole universe. These laws are strict and immutable and apply from the tiniest atom to the most gigantic galaxies. "You will not find any changing the treatment of God. You will not find any turning the treatment of God" (35:43). But does the establishment of rigorous, permanent, laws mean that limitations are placed on man, or that humanity is sentenced to lifelong invariability simply because he cannot place himself outside their limits? Of course no one, whether a believer or not, would ever suggest such a thing. The existence of natural laws is in the interest of human beings, not God, who is beyond all needs of creation. In these laws is "the work of God Who has perfected everything" (27:88). Why should we accept God's universal laws and decline to accept His Sharia? Why should we accept God's laws in His creation and deny His authority to command? In both cases, He is the All-knowing from whom nothing is hidden, the Wise, the Lasting, the Eternal Guardian who takes no rest.

Contrary to the received truth of modern secular thought, we Muslims believe that the Sharia is the divine expression of perfect wisdom, a mercy from God to his creatures. He imposes this on them to protect

their interests, and has not left them in darkness. Ignorance may lead people astray, and the whims and desires of the human soul may cause us to permit things that are socially and physically destructive. People are prone to the abuse of alcohol and drugs which destroy the mind. Their abuse of sex, through adultery, fornication, and homosexuality, threatens the family and undermines social order. Their abuse of commercial ethics, through usury, gambling, and monopolistic control of essential commodities, breaks the human spirit and crushes it under the oppressive weight of poverty.

The opponents of the Sharia do not revere God as He should be revered. Instead their reverence is directed to human beings who place their authority above that of God. How unfortunate is man, to think that he can get by without Divine Guidance. Can man really manage without the Lord who created him and fashioned him in perfect proportion?

One writer drew an analogy between the law and a father giving advice to his son. He asked whether any father would try to direct every detail of his son's life, and implied that the Sharia was impossibly strict and unyielding. But his analogy is flawed. The Sharia provides general instructions and advice while the legacy of the scholars contains the experience of centuries that we are free to benefit from. Guidance is the character of fatherhood that we should accept open-mindedly and thankfully.

HISTORICAL EXPERIENCE IN THE APPLICATION OF THE SHARIA

The Sharia is not an untried and untested system of law. It has successfully served Muslim societies for centuries and has given them the opportunity to organize just states, establish a culture based upon knowledge and faith, and make Islam the legitimate successor to such ancient civilizations as Persia, Byzantium, and Egypt. Sharia law does not reject modernity, nor does it restrict movement and progress. It is a light to illuminate the path, a spirit to invigorate the heart, and a shield against the base desires of the human soul. A fair treatment of Islamic history will reveal that whenever the Sharia was understood and used, it overcame the divisions of society and provided it with security and a noble purpose. By contrast, whenever the Sharia was ignored Muslim society was humiliated and subjugated by its enemies from both East and West. This is clear from history. While it is

true that there have been Muslim rulers who abused the Divine Law in both theory and practice, this cannot be considered a defect of the Sharia.

Many of those who oppose the modern application of Sharia law assert that it describes an ideal community that never existed outside books. Islam, they say, was applied only for a short time under the Prophet and the Four Caliphs who followed immediately after him. Fuad Zakariyah, a modern commentator who shares these views, argues that the Sharia was never successfully established, and that Muslims have almost always been ruled by tyrants.[5] He supports this statement, saying advocates of Sharia law usually speak about the Rightly Guided Caliphs as model rulers. This, he says, proves that there were no other just rulers in the entire history of Islam. Finally, Zakariyah singles out Omar ibn al-Khattab and says that he was a man of unique genius. In one and a half thousand years, we have not seen another man like him. Dr. Zakariyah's argument involves many fallacies. We will mention only three:

Firstly, Dr. Zakariyah reduces the period of the Rightly Guided Caliphs to the rule of Omar ibn al-Khattab alone. He ignores Abu Bakr's rule, in which huge achievements were made despite his short reign. He also ignores the early years of Othman's rule, a time of both domestic prosperity and foreign expansion. He ignores the achievements of Ali, who made extraordinary progress in government, fiscal policy, and treatment of dissidents, despite serious challenges to his authority and the outbreak of civil war.

Secondly, Dr. Zakariyah believes that Omar was a uniquely gifted ruler. Yet history provides many examples of rulers of similar stature to Omar. Take for example his namesake, Omar ibn Abdul Aziz, who did much to promote Islam, ruled justly in the style of Omar ibn al-Khattab and is even known as the fifth Rightly Guided Caliph. Yazid ibn al-Walid was another remarkable ruler. He took up arms against his cousin al-Walid ibn Yazid because of his excesses.[6] Yazid intended to revive justice and the rule of law. Unfortunately, he died

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5. Fu'âd Zakarîah, *al-Haqîqah wa 'l-waham*, (Dâr al-Fikr: Cairo, 1986); *al-Sahwat al-islâmîya fi mîzân al-ᶜaql*, (Dâr al-Tanwir: Beirut, 1985).

6. Yazid III succeeded al-Walid II in 126/744 and ruled for five months. *OJ*.

six months after he came to power. He and Omar ibn Abdul Aziz were the most just rulers of the Marwanid dynasty. Nuruddin Mahmoud ibn Zangi is also compared to the Rightly Guided Caliphs. He was noble and just, rose against the Crusaders, and was the enemy of iniquity and corruption.[7] Salah al-Din al-Ayubi, whose enemies admired him as much as his supporters did, is another example.[8]

Thirdly, Dr. Zakariyah generalizes too much. He passes a sweeping condemnation on all Muslim rulers throughout the history of Islam, be they Umayyid, Abbasid, Ottoman, or Mamluk. The Iberian-Moroccan dynasties, the Almoravids and the Almohads, are similarly dismissed. So too are the Moguls of India. Were all these rulers unjust and indifferent to the Sharia? Of course not. Many of them were competent and benevolent rulers, particularly in comparison to their contemporaries in other lands.

HISTORY AND TRUTH

Many people who speak about the history of Islam take a negative view of it. They base their opinions on the work of Western scholars— Orientalists who see Islamic culture and history from a Western perspective. From behind a veiled Christian prejudice, these people belittle all things Eastern and especially everything Islamic. In the pursuit of Western interests they have made the objective study of history into an exercise in prejudice and political convenience.

In a conference on Islam and the Orientalists held in India a few years ago, Abul Hassan al-Nadawi described them as muckrakers who scavenge about in garbage and are most attracted to the filthiest things they see. They tirelessly search for weak points which they publish, even if spurious, and exaggerate to support their own pre-determined conclusions. They try to discredit the great leaders of Islam such as Omar ibn Abdul Aziz, whom they accuse of economic and political ignorance, maladministration, and

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7. Ruled Syria from 541-569/1146-1174. *OJ.*

8. Ruled 564-589/1169-1193. He captured Jerusalem from the Franks and founded of the Ayyubid dynasty. *OJ.*

ultimately, of destroying the state. At the same time, they defend such men as the Umayyid despot, al-Hajjaj ibn Yusuf.[9]

Those who believe that the Sharia has not been applied since the very early days of Islam are seriously mistaken. The work of Muslim scholars, who have been busy for hundreds of years writing books about case law, legal theory, and legal practice clearly contradicts it. These books even describe cases brought before allegedly non-existant courts. The idea that the Sharia has never been applied suggests that Muslims have been practicing an empty religion for centuries. Did people not pray and fast and pay zakat? Did they not marry and engage in trade? If it is not the Sharia that regulates these things, then what does? This idea is irrational and can only lead us to disillusionment and despair. If we accept it we become a people without history, with no place in today's world, and with no future.

Mohammed al-Ghazali was recently asked to explain the historical setbacks that have befallen the Islamic community. He said,

> A distinction has to be made between Islam and Islamic thought, between Islam and Islamic government. Islam is an infallible revelation, but Islamic thought is the human effort to understand this revelation. Islamic government is the effort of human beings to implement Islamic thought. Both the understanding and its implementation are fallible. When one person commits a mistake, it will not last long because someone else will soon correct it. When a ruler commits a mistake, it cannot last forever since another ruler will rectify it. The entire community of Muslims—God willing—cannot agree on error.
>
> This nation is the bearer of the last revelation. It will be disciplined by fate when it becomes lax or indifferent. Reformers dedicated to the faithful observance of the revelation will always redirect it to the right path. God says, "Of those whom We created there is a community who guide with the Truth and do justice with it" (7:181).

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9. Al-Hajjâj b. Yûsuf b. al-Hakam b. ʿAqîl al-Thaqafî (41-95/661-741), Governor of the Hijaz, Yemen and Yamama under the Umayyad Caliph Abd al-Malik and later governor of Iraq. For an example of a passonate defense of him by an orientalist, see H. Lammens "Hadjdjâdj ibn Yûsuf" in *First Encyclopaedia of Islam 1913-1936* (Brill: 1987), III, 202-204; and also A. Dietrich, *The Encyclopaedia of Islam*, (Brill: 1979), III, 39-43. *OJ.*

> There is nothing strange about finding errors in our cultural and political history. What is strange is that we should try conceal them or fail to overcome them.[10]

CONCLUSION

Today we enjoy the benefits of man's long political experience. Guarantees are now in place to protect the public from tyranny and arbitrary rule. National assemblies keep an eye on government, ensure public accountability, and can even replace errant rulers. Written constitutions define the relationship between the ruler and the ruled, protect civil liberties, and restrict government power. Freedom of the press, freedom to organize political parties, freedom to form professional associations, and the right to strike, give further protection against the abuse of authority.

Muslims should cling stubbornly to the safeguards that have been won through long years of struggle against tyranny. Their preservation should be considered a religious duty that must not be ignored. The Sharia demands justice, consultation, the giving of advice, sincerity in the discharge of responsibility, the enjoining of what is right and the forbidding of what is wrong. These obligations cannot be fully met until an appropriate political protection is secured. This protection is therefore obligatory.

Governments today are able to intervene directly in the lives of the people they govern, to shape and mold the public in terms of ideology, morality and personal behavior. Islamic government in the past was unable to do this since it had no practical means to project itself directly into the public mind. The means to do this now lies primarily with educational establishments and the mass media, which for the first time give the state the power to shape public opinion. Islamic rulers must use these tools in the service of Islam, for it is only for the service of Islam that the state itself exists.

We are not calling for an ideal ruler, for another Abu Bakr, Omar, or Ali. A basic structure of government is required, one founded on the principles of Islam in terms of law, in terms of political orientation, and in terms of practical organization. Its belief, its ideology, its ethics,

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10. Muhammad al-Ghazâlî, *Mi'at su'âl ʿan al-Islâm*, II, 352-4.

and its laws, must depend directly on Islam. The ruler in this system, be he President or Imam, is not a god whose word is law and who may do whatever he pleases. He is a ruler guided by a constitution derived from the Qur'an and Sunna. He is accountable, first before the national assembly, and then before the people. The scholars of Islam, too, bear a responsibility to advise the ruler and the public, and they have a special obligation to enjoin what is right and forbid what is wrong.

We should not be obsessed with finding the perfect leader, sent by God to fill the earth with justice as it is today filled with injustice, or to revive faith for those who have lost their way. I once wrote a long paper on the well-known hadith reported by Abu Da'ud, "At the beginning of each hundred years, God will send to this nation whoever may reform its religion."[11] Many commentators believe the word "whoever"[12] refers to a single person. They began to look for him in every age. He would be a person known for his knowledge, good deeds and kindness, the reformer, the *mujaddid* of the century. While the word "whoever" may refer to either singular or plural, in this hadith, it refers to the plural. Thus the *mujaddid* may be a group of people rather than an individual. Alternately, this could refer to many people appearing in different places at once. Each reformer may be active in his own field, whether it is theoretical or practical. He may work to spread Islam, teach, or fight in the cause of God. Rather than to wait passively for a savior to appear, Muslims must take positive action and ask themselves what each of them can do for Islam and the Muslims.

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11. Abû Dâ'ûd, IV, 109 (no. 4291).

12. The word in the hadith is *man*, a relative pronoun meaning in this context 'who,' 'whoever,' or 'whosoever.' *OJ*.

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IJTIHAD IN THE TWENTIETH CENTURY

We have seen that the Sharia is a universal and eternally valid system of law. If it is suitable for any society in any age, it should, with even greater reason, be applied to our own times and in Islamic countries in particular. There is no system of law that is better suited to these countries than the Sharia. People may ask how the Sharia can be made to work today, since the world has changed so radically. Almost every aspect of public and private life has been transformed during the last century. Political authority is more widely distributed: most governments include some type of public representation and the absolute authority of rulers no longer goes unchallenged. People now have fundamental human and civil rights, and there is a new relationship between the citizen and the state. Problems of economic development also pose significant legal difficulties, especially with respect to banking, insurance, emigration, and international trade. Science and technology continue to transform our lives. Social life has also changed and women now form a significant part of the labor force in many countries. Finally, mass communications have reduced physical and psychological distances between countries.

These are only a few of the changes we have seen in modern times. The question before us is how are we to confront the new world with an "old law"? How can old solutions fit new problems? As we have seen, the Sharia can cope with change and adapt itself to new conditions and environments. But before the Sharia can work successfully in modern times, certain conditions must be met. A return to Sharia law will require the cooperation and support of everyone. If we really want to go back to the divine law of the One Who created us and Who cares for us, we can succeed. If we make

a serious effort to understand the law, we can make it work for us today.

THE REVIVAL OF JURISTIC REASONING

The first and most important condition for the successful reestablishment of the Sharia is to reopen the door to ijtihad and to revive the legal creativity of former times. The Prophet used ijtihad himself, and no one has the authority to deny our right to use it also. Secondly, we must abandon the misplaced loyalty to a single school of jurisprudence. There is no evidence, either from the Qur'an or the Sunna, that we must follow any particular school of jurisprudence or group of scholars. On the contrary, the Imams themselves said that their opinions could be accepted or rejected.

When the Abbasid Caliph al-Mansur asked Imam Malik to write a legal manual for general use, he said it should take a middle path between the liberality of Ibn Abbas and the strictness of Omar. Malik called his book *al-Muwatta.* When the Caliph said he would impose it on the Muslims all over the world Malik objected. He told al-Mansur not to do it because people previously heard things being said, and each group took what they heard first. "Let the people alone," Malik said, "to continue with what they have chosen for themselves." In another narration he said, "The Companions went to different countries, and in every place people have a certain understanding and a certain knowledge. If you force them to follow a single view, the result will be chaos." Al-Mansur relented.[1]

Imam Malik did not believe he was the only person with the right to have a legal opinion, and he did not believe that his ideas were truth manifest. Malik did not want people to be committed to a single view— especially not his own—since any opinion can be wrong. Many different problems had already come up, and there were many different approaches to law. This was true even in the age of the

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1. Abdullah b.Muhammad al-Mansur, Abbasid Caliph. Ruled 136-158/754-775; al-Sha'rani, *al-Mizan,* I, 30. Another version of the story says that this happened with Haroun al-Rashid. It may have been that both Caliphs proposed this at different times. Haroun b. Muhammad al-Mahdi al-Rashid ruled from 170-193/786-809. Imam Malik died in 179/794. Al-Tabari mentions both Caliphs in his account. See *Tarikh al-rusul wal muluk,* ed. M. J. De Goeje, (Leiden: Brill 1964), III, 2519-20. *OJ.*

Companions. There were, however, great scholars around whom other scholars gathered and upon whom the people of a particular place came to depend. In conditions of relative isolation, local traditions of jurisprudence multiplied and different styles of jurisprudence developed. We can be sure that Malik would not be disturbed to know that we have passed over his opinion in favor of someone else's. Similarly, the other Imams would not object if sound reasoning leads us to contradict one of their decisions. None of them has claimed to be infallible.

Malik said, "Anyone's words may be taken or left except those of the Prophet, upon whom be peace." He also said, "Nothing will work with the last of this nation except that which worked with the first of them." We know that "the first of this nation" did not imitate; its scholars paid particular attention to the Qur'an and the Sunna and stuck closely to them. Ordinary people used to ask people of knowledge about whatever they did not understand, but they did not express their loyalty to the views of any particular scholar. If any of the Imams of that period could be asked about the problems of our day, they would surely change their views about many things. Perhaps their opinions depended originally upon factors that are no longer relevant. Perhaps evidence that is common knowledge today was not known to them then. Or, perhaps positions that they thought were weakly supported have now been proved stronger.

WHAT DO WE EXPECT FROM JURISTS TODAY?

When considering the way forward some people take an extreme position and say Muslims should abandon their legal heritage. They suggest a simple return to the Sharia and believe that historical jurisprudence and its various schools of thought resemble a coat that has been tailored to suit a particular individual: the Sharia itself is merely the fabric from which any garment may be made. They should make a new coat—or law—out of the raw material of the Sharia. This is better than altering old and worn out clothes to fit a new generation. Such opinions are uninformed, unhelpful, and unworkable.

Over time, knowledge grows and moves to higher levels of perfection. Each generation contributes to a common heritage and builds upon what was left behind by those who came before. This might take the shape of a refinement, renovation, or correction, and applies to all types of knowledge. The same logic, for example, could never be

applied to the explanation of the Qur'an. It is unacceptable for anyone to do this without considering the opinions of past generations about its meaning. No one should produce a new interpretation based on a bare text. All attempts to do this must lead to failure.

To revive juristic reasoning does not mean that Muslims must deny their legal heritage. There are, however, several points that require further explanation. First, Muslims must have a broad picture of the knowledge of earlier generations. They should take special note of the ideas and legal methods of the Companions and the early generations of the Muslims. Then they will be in a position to know how this knowledge can be applied to their problems today and how it can be used to achieve the goals of the Sharia. Second, they should return to the sources, to the solid evidence of the Qur'an and Sunna, according to their traditional understanding of them. Third, they should renew their efforts to confront issues and situations that jurists of the past did not have the opportunity to address, and to produce suitable rulings on them.

SELECTING FROM THE LEGAL HERITAGE

When I say Muslims should review their legal heritage critically and choose from it the things that will be useful to them today, I do not mean that they should make a random choice, or let themselves be swayed by public opinion. They must not select whatever is easiest, without regard to its correctness or the strength of its evidence. They should not simply pick and choose from past rulings in order to apologize for our present situation. It was this type of selectivity that originally led to the abandonment of Sharia law throughout the Muslim world. Not all of the opinions of past jurists are of the same calibre. Rulings may be textual, depend on consensus, or result from the use of analogies, consideration of public interests, local customs, or other subsidiary or subjective sources of legislation. The legal theory that has been passed down by earlier generations should now be re-examined. The views of scholars of the past should be assessed impartially in the light of the Qur'an.

EXERCISING DISCRETION ON NEW ISSUES

It is the common obligation of the community to approach the issues of our times from the perspective of what Muslims already know about the Sharia. In this way, they can use the Qur'an and Sunna to

discover solutions to the problems they face. Many things have changed dramatically in modern times. These changes have lead to the emergence of new difficulties and challenges for jurists. There is no way for Muslims to meet these challenges except by exercising their reasoning to discover new solutions.

Ijtihad

Juristic reasoning, or ijtihad, is subject to a number of controls or conditions. We will now consider the most important of these.

First, while any ruling based on the subjective opinions of jurists may be reviewed and ultimately changed. Rulings based on solid objective evidence are excluded from this process. Anything that is established by the Qur'an, like the obligation to fast in Ramadan, prohibitions of alcohol, pork and interest, or the laws of inheritance, cannot be changed. These rulings are directly supported by the Qur'an and Sunna. Muslims have unanimously agreed upon them and they are universal features of Islamic societies all over the world. These are the things that make Muslims into a single cultural entity, known in Arabic as the *Ummah*.

Second, things that have never been challenged before must not be questioned. Neither should we listen to people who want us to believe that nothing is clear in religion and who say that everything is really only a matter of informed opinion.

Third, the organization and classification of specific rulings must remain as they have been passed down to Muslims today. Rulings established by the Qur'an and the confirmed teachings of the Prophet cannot be reclassified as subjective rulings. Likewise, rulings based on human reasoning cannot be raised above this level. This has happened before when people tried to close discussion of a problem by asserting that a consensus had previously been reached. A legal consensus, though formally valid, is not the same as universal agreement. This assertion should not be used to excuse ourselves from trying to find a real solution. Imam Ahmad is reported to have said that whoever claims a consensus has been reached is exaggerating since no one could know everyone's opinion.

Forth, the importance of "modernity" should not be over estimated. Many aspects of contemporary life are the products of a non-Muslim society and have nothing to do with Islamic belief, law, or ethics. Many

things were imposed upon the Muslims, whether they liked it or not, at a time of collective weakness. Modern "Muslim" societies often owe much to determined outside forces that they were unable to overcome. This is a world inherited from our fathers.

Muslims should not justify the status-quo by forcing texts to support it, nor should they engage in a creative jurisprudence to turn black into white. God wants Muslims to be witnesses to all nations, not to submit themselves willingly to other people. We must not disregard our unique identity and follow slavishly behind whoever may have come before.

Fifth, Muslims must not be obsessed with resisting everything new, nor should they crave everything foreign, however useful it might seem to be. They must discriminate between what is appropriate for them and what is not, between what should be encouraged and what should be discouraged. Muslims should know when to be firm and when to be flexible. To do this, they must be able to tell the difference between original sources and subjective arguments, between the general and the particular, between ends and means. With the former, they should be unyielding, while with the latter they should be silk-soft. As Muhammad Iqbal said, Muslims should embrace anything new that is beneficial and preserve any thing old that is useful.[2]

Sixth, to successfully revive ijtihad, Muslims should expect to make mistakes. They should forgive scholars when they err and not accuse them of disbelief or apostasy. Several conditions must be met before a person is qualified to exercise ijtihad. For example, a scholar must first acquire a standard foundation of knowledge. This foundation is described in most books of law. It is important to recognize that not just anyone who has worked in law, written on this subject, or memorized hadiths, is qualified to do this. There are people who attempt to pass rulings but do not have even the slightest grasp of the Qur'an and Sunna. Some are completely ignorant of the principles of jurisprudence, and use methods that are anything but straightforward. Such people are a threat to the sanctity of Islam and to the honor of the Sharia. Their opinions should be rejected out of hand. Many

2. Muhammad Iqbal, Urdu poet and thinker, author of *The Reconstruction of Religious Thought in Islam*, (Ashraf: Lahore).

people try to gain some advantage in this way, to achieve social status or worldly benefit, or merely to deceive others. Some use the Sharia as a tool to support a despotic ruler, or to justify behavior that is really inexcusable. Some have even used the Sharia to promote an alien ideology.

Then there are the apologists who try to excuse degeneracy and the perversion of truth, and conjure up evidence from religion to support a twisted reality. New religious judgements appear and turn concrete evidence on its head. Astonishing rulings achieve the impossible, seem to change lead into gold, and the forbidden is magically permitted. An example of this is the modern controversy over bank interest, or *riba*. Here we have a tortured attempt to reconcile faith with disbelief. Mahmoud Shaltut brings up the subject of apologetics and describes some modern attempts to explain away the Qur'an's prohibition of interest:

> Some people say the Qur'an only forbids excessive rates of interest, and quote the words "doubling and redoubling" (3:130) to support their premise. According to them, interest is permissible so long as it is not "doubling and redoubling!" This argument is baseless, for God—to Whom be ascribed perfection and majesty—said "doubling and redoubling" to reprimand people for what they were doing, just as he reprimanded those who prostituted their slaves, and said, "And do not force your slaves into prostitution if they want to keep chaste, so that you may seek the offering of the Life of This World" (24:33). This does not mean that a person may prostitute his slave so long as she does not object. It means that God has denounced the practice of prostituting slaves and has forbidden it. The same applies to interest.

Others argue that a certain "legal" level of interest is necessary to protect lenders from bad debts. They do not accept that this could be damaging or unfair to anyone but see it as useful and beneficial to commerce. Still others argue that there is no difference between a kind of purchase by installments which the Sharia allows, called *salam*, and interest. They base their claim on the fact that both depend upon timed repayments.

There are those who believe interest is necessary for the Muslims and say that since the economic well-being of the country is linked to an economic system based on it, we must either accept interest or face economic chaos. They say this is a case where something that is

forbidden becomes permitted because of necessity. This is a silly argument since the welfare of the community cannot depend on something that is forbidden.[3]

Apology is not confined to those who trade their faith for comfort in the world, or who exchange God for Pharaoh. Apology also appears among people who sincerely want to help, who want to relieve hardship, and defend religion from the accusations of rigidity, backwardness and opposition to the modern world. Nevertheless, the spirit of apology is defeatist. Apologists often think only in terms of what exists now and do not imagine what could or should have existed. This is a serious error and a major disservice to truth.

Return to Islam as a Whole

The Sharia cannot be applied successfully in modern times without a return to ijtihad. While the Sharia has the theoretical potential to cope with the problems of development there are several issues that must be resolved before it will be able provide a viable framework for a just and prosperous society.

Islam must be taken in its entirety: the teachings of Islam must be applied to all aspects of life and to the organization of all social institutions. It is not acceptable for the courts to use parts of the Sharia and ignore others. Neither is it acceptable to impose Islamic Law in the courts and continue to permit educational and cultural instutions and the media to promote non-Islamic values and ideologies. The teachings of Islam describe a comprehensive system, each part of which supports the other. To take some parts of the Sharia and leave the others seriously undermines the effectiveness of anything taken from it. For example, sexual relations outside marriage are prohibited in any Islamic society. For this prohibition to be effective we must encourage people to get married and make this as easy as possible for them. If the average amount paid by young men to their wives is lowered, housing is made more readily available, young people are not expected to buy expensive furniture, and less money is spent on wedding parties, then people would be greatly helped towards mar-

3. Muhammad Shaltût, *Tafsîr al-Qur'ân al-karîm*, 148-152. See also Muhammad Abû Zahra, *Fawâ'id al-bunûk hiya al-riba al-harâm*.

riage. If marriage becomes a real possibility, if minimum standards of dress are established in public, if sexual titillation in the media is abolished, and if pornography is supressed, then the Sharia punishments for sexual offenses will become more relevant. It is not easy to understand the justice of these punishments when marriage is an impossibility, when society encourages sexual license and glorifies rebellion, and when people can easily find opportunities for illicit sex. Here, punishment may not even represent a deterrent.

The same thing applies to theft. According to the logic of Islamic justice, it is not feasible to execute God's command to punish the thief while we ignore His command to pay zakat and refuse to address problems of social justice and poverty. A single verse in the Qur'an requires the amputation the thief's hand, but there are dozens of verses that command Muslims to give charity and to spend our money in the cause of God. God calls us to feed the poor and warns us against hoarding, fraud, taking and paying interest, and gambling. He requires justice and solidarity from Muslims so that no one in any Muslim society will be forced to steal. When Muslims apply the Sharia comprehensively, teach the illiterate to read, feed the hungry, transform insecurity into safety, and abolish poverty, then the thief will have no excuse and those who hope to profit unjustly at the expense of others will be certain of punishment.

The Sharia is an indivisible whole. We must be absolutely certain about this. The Sharia is Islam, its beliefs, its rites, its ideals, its values, its ethics, and its laws. Taken together, these are the things that make up Muslim society. Legislation is only part of the picture. No one should ever believe that an ideal Islamic society can be established by decree. Laws alone do not make a nation. They must have the full support of the people, intellectually and morally, so that they will be able to live by them. The Qur'an says, "In truth God does not change the condition of a people until they change what is in themselves" (13:11). Such a personality will be totally guided by Islam.

We should work to raise a generation of Muslims who will be able to bear the message of Islam with conviction and sincerity. This generation will play a leading role in the resurrection of Muslim society. To build this new generation, Muslims must insist upon Islam as a complete idea and abandon partial solutions and self-imposed restrictions that only take us further from our goal.

The Muslim community can only be liberated by a comprehensive intellectual, and psychological transformation. Muslims must return to the reality of their own long forgotten selves.

Worship is related to belief, belief acts upon morality, morality leads to law, and law is the source of the state. All these things are interconnected. Muslims must have a wider vision of Islamic law in the modern world if they want to lead the ideal life God has commanded. The Qur'an warned us not to be deceived about this:

> And judge between them by what God has sent down, and do not follow their desires, but beware of their seducing you from some part of what God has sent down to you (5:49).

Once, a group of Jews offered to embrace Islam if they could keep some of their old beliefs and traditions, but God revealed a sign and insisted that acceptance of Islam must be total and unconditional.

> You who believe! come one and all into peace, and do not follow in the footsteps of Satan. It is he who is an open enemy to you (2:208).

Overcoming the Present

Before Muslims can reestablish the Sharia, they must somehow overcome the reality of Muslim societies today. Many of these societies are the products of colonialism. Islamic values and traditions were forcibly removed by an aggressive outside force whose goal—the subjugation of the Muslims—could only be achieved by the emasculation of Islam. Much of what makes up everyday life in the Muslim world today, its economic and social institutions, dominant political philosophies, and even popular fashions, work against the goals of Islamic society and blatantly violate the Sharia. For example, bank interest is permitted to dominate all kinds of economic activity, alcohol abuse and the illegal trade in it is tolerated, gambling and pornography are permitted, and inappropriate standards of dress are regarded as acceptable in public. While government institutions exist to impose various levels of control on the mass media, including television and radio, a popular culture of songs, TV series, and films continues to encourage immoral and anti-social behavior. In addition to this, Muslims live under an imported legal system, founded in an alien religious and cultural tradition. This was imposed, not chosen, and affects all aspects of social and political life in the Muslim world.

This is the bleak reality of our situation, but it is not divinely ordained. It is only a symptom of our continuing weakness and lack of resolve, and the inevitable result of a long history of colonialism in which no effort was spared in the achievement of the invaders' goals. What made colonialism even more successful was its ability to represent itself as powerful and successful at a time when the Muslims were weak. Ibn Khaldun pointed out how the conquered are always fond of imitating the conqueror. Because of this, Western leaders did not find much difficulty in imposing whatever they liked on the Islamic countries they came to rule. Muslims were ready to be conquered even before the final defeat.

If this willingness to be dominated no longer exists and Muslims decide to go back to the "source" and purify themselves from the intellectual, psychological, and material stains of colonialism, they will at least know where the road ahead lies. They created this situation and they can change it.

Muslims should not believe this situation is predetermined or unchangeable. They should not believe there is no option to submission, or that legality and public interest lie in making things easier rather than making things better. They are responsible for their situation and they must change this when they can. To do this, Muslims must start by changing themselves, their thinking, their orientation, and their behavior.

The function of religion is to set a supreme example, not to justify present reality. Religion should inspire people to lead, not to follow along behind others. Modernity does not mean, as many people think, that religion should no longer lead. To accept this would only result in disorientation and confusion, since all normal points of reference will be lost and balance, stability, and sense of direction would then be impossible to maintain. It is the duty of Muslims to lift reality up to the horizons of the Sharia. They must not try to pull the Sharia down into the abyss of reality. It is the duty of Muslims to live by the law of God. Divine law must be allowed to shape, nurture, and transform mankind. The Sharia is the word of God, and the word of God is exalted to the heights.

APPENDIX ONE

THE CODIFICATION OF THE SHARIA

Many modern commentators believe that one of the major obstacles preventing the use of Sharia law in modern times is its lack of codification. By this they mean that Sharia rulings should be drafted into orderly, numbered andorganized like modern laws into various categories—civil, criminal, and administrative. This would make the law easier to use and to refer to when passing judgements.

The Ottoman State Committee for Legal Reform

Sensing the importance of this matter, the rulers of the Ottoman Empire set up a committee to draft a new civil code at the turn of the century. Since the Hanafi school of law was the official interpretation of the Sharia in force within the Ottoman Empire, the new code was based on Hanafi jurisprudence. This was finalized in 1896. The Committee based its work upon the common Hanifi books of law. When Abu Hanifa and one of his companions differed on any particular subject, the view that was most compatible with the needs of modern life and the welfare of the community was adopted. For example, they chose the view of Abu Hanifa's two principle companions, Abu Yusuf and Muhammad, over the Imam's own opinion when they considered the type of limitations that could be placed on the mentally deficient. Likewise, they adopted Abu Yusuf's view about contracts for manufacture.[1]

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1. The Committee mentions in its report why it was inclined to favor the view of Abu Yusuf in this matter. They said, "According to *al-Imam al-'Azam* (Abu Hanifa), a contracting party has the right to revoke a contract for manufacture unilaterally. Abu Yusuf, however, says that since a contracting party would have agreed to the terms of a contract at the time of its signing, he has no right to revoke this contract unilaterally. In our times, manufacturers are engaged in the building of ships, the smelting of ore for cannon, and the provision of diverse kinds of goods. As a result of this, manufacturing has become an activity of considerable

The Committee rarely adopted non-Hanafi views. However, they sometimes took the views of later Hanafi scholars, even if these contradicted the accepted Hanafi position. Sobhi Mahmasani, addressing the work of the Committee, says

> [It] performed a great service to the legal and judicial professions. Previously, information on any given question lay scattered throughout the many books of legal theory, case law, and pronouncements of jurists. The Committee made the legal rulings of the Sharia clear and consistent. Judges and lawyers were no longer required to make a great effort to understand and use them. While we were previously occupied with the tracing of annotations and footnotes in various editions of law books, the Committee gathered them all into one place, explained the meaning of many issues, laid out their sources and clarified the evidence to support its conclusions.[2]

Critics of the Committee's work compared their results to European civil law and objected on several counts. First, the proposed civil code did not include laws relating to personal civil status—laws governing marriage, divorce, maintenance and paternity, guardianship, inheritance and so forth, despite their importance to Sharia law and in daily life. Second, the proposed civil code had no general theory of contracts, even though we find the principles of offer and acceptance mentioned in the section on sales in all law books. Third, most legislation on civil offenses was scattered through the proposed code in subsections relating to such things as robbery and malicious damage. Finally, the Committee imposed conditions on some types of contracts that unnecessarily restricted the rights of contracting parties and failed to take into consideration the solutions to some of these problems developed by non-Hanafi jurists.

THE ISLAMIC RESEARCH INSTITUTE, CAIRO

A similar attempt to reform Sharia law was made by the "Islamic Research Institute" of al-Azhar University, in Egypt. As a first step

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importance. Therefore, were contracting parties free to sign contracts and later reverse their commitments, gross infractions to public interest would possibly ensue." See Muhammad Abdul Jawad, *Milkiyat al-arâdhi fi-l' Islâm*, (al-ᶜAlamîyah Press:1972), 14fn.

2. Subhî Mahmasânî, *Falsafat al-tashriᶜ al-Islâmî*, (Beirut: Dâr al-ᶜIlm, 1980), 97-8.

toward a comprehensive review of the law, al-Azhar set up several committees to organize the rulings of each of the four schools of jurisprudence separately and prepared a draft proposal covering the regulation of sales in each of the four legal traditions. But al-Azhar, anxious to see something done as soon as possible, completed its work too hastily and did not give adequate attention to analysis and criticism, nor did it take sufficient account of legal practice. It was as if they believed the Sharia could be applied easily, if only its rulings were arranged in a series of orderly, numbered articles!

One of the fundamental errors of this project was its insistence on considering all four schools of jurisprudence separately. Another weakness was its tendency to opt for the most common view among a given group of scholars. Despite the belief of some members of the council that the Sharia should, above all, be forged into a single code of law based upon the work of all Islamic scholars, the view that distinctions should be maintained between schools of jurisprudence prevailed. This decision was based on the belief that differences of opinion among scholars constitute an obstacle that can neither be ignored nor overcome. This was unfortunate since it failed to acknowledge the fact that God has not required any one to commit himself unquestioningly to the views of any human being. This kind of commitment is appropriate only to the Qur'an and the Sunna of the Prophet, peace be upon him. As Imam Malik pointed out, the views of any scholar may be accepted or rejected.

If we could ask any of the classical scholars about modern problems, they would most likely change a great deal of what they used to say. There would be nothing surprising about this since they reversed many of their own opinions themselves because of a change of conditions, a change of time, a change of custom, or a change of situation. This is why accounts of their sayings varied and sometimes seem to contradict one another.

It is not acceptable to stick rigidly to a single view while the world around us is constantly changing. Such rigidity is neither in the interest of the Sharia nor of Islamic jurisprudence. It was just such misplaced loyalty, just such a refusal to accept the views of anyone who does not follow one's own school of jurisprudence, that led to the failure of the Muslims to codify the Sharia in the first place. Muslims sacrificed the Sharia in the interest of their schools of jurisprudence and lost both in the process! Scholars must accept the best,

most strongly supported views from any source, so that the law can best respond to the spirit of times and the interests of the people. In this we should be guided by the Qur'an and the Sunna, the general rules of the Sharia, the spirit of Islam, and the footsteps of our pious predecessors, who, in their exercise of discretion and skill in the use of legal method, opted for the easy and avoided the difficult.

Recent Moves toward Legal Reform

Most Islamic countries have witnessed some form of legal reform in the twentieth century. This normally includes attempts to codify parts of the traditional legal system. According to Mustafa al-Zarqa, legal reform became so common in the Ottoman Empire that it is difficult to find any portion of the Sharia that was not modified or revised in some way. Several causes lay behind this:[3]

1. Economic development, both at regional and international levels, brought with it a variety of new institutions and practices, some of which were based on custom while others were borrowed from Europe. Such things as limited public liability, ordering on commission, various types of insurance schemes, and procedures in dealing with contracts were not previously treated by the Sharia.
2. There was a need to regularize some aspects of contract law that conflicted with Hanafi jurisprudence or with other interpretations of the Sharia.
3. A uniform procedure for the registration of real estate was needed, for legal, fiscal, and political reasons, so that land tenure could be brought under government supervision.
4. There was a need to standardize legal sources and procedures to be used at various levels of the judicial system.
5. Economic growth contributed to the growing legal paralysis since later jurists confined themselves to traditional interpretations of theoretical law and were unable to offer solutions to the many new problems development brought. An active, creative jurisprudence was needed to confront the problems of the age.

3. Mustafa al-Zarqa, *al-Madkhal al-Faqhi al-'Am*, I, 212-4.

Apprehensions of Some Scholars about Codification

Some scholars object to the codification of the Sharia. A few of the points they raise follow.

1. Codification means that a judge should abide by one opinion—the one that was chosen by those who codified the law—even though a thorough study of a question may reveal many views that a judge should be free to consider. In so doing, he may find a more suitable and equitable solution to the problem before him. Codification "freezes" the judge and confines him to a few opinions. Jurisprudence, in the old sense, gives him the latitude to choose the right ruling according to the circumstances of the case under consideration. In fact, a judge can exercise his own discretion and even pronounce his own ruling based on the principle sources of the law if necessary. If there is no person qualified to pass such rulings, then someone less qualified may sit to judge cases merely by reference to precedent. This, however, is only admissible under dire necessity, and such a person should at least be able to make an informed decision by referring to case law.
2. Codification is particularly harmful when practical application of some laws reveals serious deficiency or incompatibility. They may be working now, but as situations change they become irrelevant to the needs of the judge.
3. Codification may produce lazy judges who depend on the written law, rather than refer to the sources of jurisprudence and their related evidence for a ruling. This would widen the judge's resourcefulness and keep him invariably linked to jurisprudence and its sources.

Considerations Favoring Codification

While these are all reasonable objections, there are even stronger arguments in favor of codification.

1. Some judges need to be bound and controlled so that they do not pass arbitrary, contradictory, or confusing rulings. Not every judge is able to make correct choices and draw successful con-

clusions. Some of them may be influenced by their emotions, others may judge similar cases differently.

2. If the law is codified, parties to a dispute can have a better idea of what ruling a judge will make. For example, a divorced woman with young children will know whether or not the judge will leave the children in her custody. Without codification she would be unable to anticipate the judge's reaction to her case.
3. Codification of the Sharia does not mean that a judge must depend entirely on reading and memorizing. No judge who respects himself and his profession should settle for this. Every law should have an explanatory note and short or long interpretations that highlight some of its aspects. The Ottoman committee developed several interpretations of the dominant Hanafi school, so we should not worry if judges and lawyers rely on the codified law and leave the original sources aside.
4. No law in the world, however sophisticated it may be, can cover all disputes and have a decisive view on them whenever they are brought to the attention of the judge. So, what happens if the judge could not find a specific ruling in the law to treat the case being handled? The judge should pass a judgment in any case that is brought up to him, and his judgment should be based on acceptable reasoning. He should derive this reasoning from recognized sources. That is why the law itself names the sources the judge should consult when a specific legal text is lacking. Thus, Egyptian law called for referring to custom, the Islamic Sharia, or "natural laws of justice." Naturally, laws derived from the Sharia should contain a provision requiring referral to the sources before a legal ruling on any particular case may be pronounced. Again, we feel confident that judges will not abandon jurisprudence and the sources of the law; nor indeed give up further research into them.
5. Sharia judges have been imitators for many centuries. They have stuck to the prevalent legal traditions in their respective countries and generally exercised only limited discretion, preferring to adopt the most common opinions and local practices of their times. They usually did not allow themselves to apply an opinion that was not supported by the local school of jurisprudence, even if it was more strongly supported by the sources.

The result of this was that judges were not given enough latitude to make the judgments they preferred. They were bound by rulings which never took the shape of a specific law. We should commit ourselves to a law enacted by a team of scholars who are well established authorities of the Sharia, acquainted with the requirements of this age and situation of the people, and aided by strong and trustworthy men of law, administration, and economics.

The Codification We Need

Codification of the Sharia should meet a number of conditions: It should not stick to a single tradition of jurisprudence, nor to a single opinion in that tradition. To do this is to put limits on the law of God, and to place unwarranted restrictions on jurisprudence. The secret of the Sharia's flexibility lies in its wealth of opinions. Whoever wants to select rulings will find a great latitude to do so. If he finds nothing in one tradition, he will find something in the other. A judge, or a ruler, should not be restricted to the four orthodox legal traditions but should choose from any legal tradition and from the opinions and rulings of the Companions and those who came immediately after them. All legal traditions are equal in their relation to the Sharia, so long as they do not contradict the Qur'an and Sunna.

We must make use of this wealth and discover its secrets without being unreasonably loyal to any particular school of jurisprudence. Had the scholars of the Ottoman Empire succeeded in reconciling all significant traditions without being bound to Hanafi jurisprudence alone, then Western laws need not have replaced the Sharia in Islamic countries. This could have been the beginning of a new age in Islamic jurisprudence.

The Ottoman committee itself confirmed some obsolete opinions in the Hanafi tradition, simply because they thought this was in the public interest at the time. In its last days, the Ottoman state was forced to abandon the Hanafi tradition and to consider the opinions of other schools. For example, to free a woman from an abusive husband, they adopted compulsory separation of husband and wife from the Maliki tradition.[4]

Those who define the law should select from all the traditions of Islamic jurisprudence, beginning with the traditions of the Companions and Followers and follow the strongest evidence that is compat-

ible with the objectives of the public interest and the Sharia. We should follow the example of those jurists who gave precedence to a particular opinion because it was "most the suitable in our situation." A central concern of the Sharia is that things should be made easy. That is why we should, when offered two equally valid legal options, choose the easier one, following the example of the Prophet, peace be upon him.

The law should be reviewed periodically in the light of the practice and remarks forwarded by judges, lawyers, and those concerned with the legal affairs. This helps in revising and updating the law. Omar ibn al-Khattab, for example, would pass a ruling and then rule quite differently in a similar case a year later. When asked why, he would answer, "That was according to what we knew then, and this is according to what we know now." Imam al-Shafi'i had two traditions, one in Iraq, called "The Old School," and the other in Egypt, called "The New School." In books of Shafi'i jurisprudence, it is common to read, "In the old school, al-Shafi'i said so and so, and in his new school he said so and so." If legal rulings can change with time, place, situation and custom, then the law can change to reflect this.

Our Duty is to Codify the Law

Today, it is vitally important for us to have a firm grasp of Islamic jurisprudence, its history and methods, and to have a solid understanding of the needs and the problems of our age. Only then will we be able to propose a system of law that conforms to the demands of the Sharia. We must avoid repeating the mistakes committed by the Ottoman State Committee. The successful codification of the Sharia requires a thorough understanding of all major currents of jurisprudence and, with regard to Islamization of non-Sharia systems, an understanding of current international law. The effort will require the unrestricted re-introduction of ijtihad. Finally, a theoretical model of jurisprudence based on the methods of the Companions and their

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4. This approach was adopted by some Companions: the two arbiters have the right to rule for the separation of the husband and the wife, which is mentioned in the verse as, "appoint a referee from his family and a referee from her family" (4:35). There are other rulings concerning such things as abandonment by a spouse and so on.

immediate successors must form the basis of codification. To be able to reform Islamic jurisprudence without having to sacrifice its originality, we will require a generation of scholars who combine detailed knowledge of the Sharia with a firm understanding of modern law.

APPENDIX TWO

THE COLLECTION AND CLASSIFICATION OF HADITH

A hadith, is a record of the sayings or actions of the Prophet Muhammad, upon whom be peace. In addition to hadiths there are also accounts relating to the Prophet's Companions which some scholars call *athar*. This article deals only with hadiths.[1]

Hadiths were collected and written down from the time of the Prophet. Many Companions made their own collections, including Abu Bakr who is said to have written down more than 500 hadiths.[2] The system of giving sources for a hadith account became known as *isnad*, literally meaning "support." Isnads were used in the pre-Islamic period to transmit poetry[3] and were later adopted and refined into a system to verify hadiths. Sometimes the Companions would attend the Prophet's teaching circles in turns and then report to one another what he said. They would then say "the Prophet said so and so" or "the Prophet did so and so." If this was reported by a third party he would also mention the name of the Companion from whom he had heard it.[4]

In order to determine the reliability of a hadith and to classify it according to type, scholars examine its isnad. With time, an independent science of hadith criticism developed. This is known as *'ilm al-jarh wa al-ta'dil* which means "knowledge of invalidating and declaring reliable." Ibn Sirin (d. 110/728) refered to the birth of hadith criticism when he said,

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1. This section has been prepared by the editor and does not appear in the original Arabic version of this book. *OJ.*

2. Muhammad Azmi, *Studies in Early Hadith Literature*, (Indianapolis: 1978),. 34.

3. ibid. 212

4. ibid. 213

(The Companions) did not ask about the isnad, but when the *fitnah* broke out people began to say, "Name us your men." Accounts that were attributable to *Ahl al-Sunna* were accepted and those attributable to the innovators were rejected.[5]

Scholars assess hadiths in several ways. The most important of these concerns reliability. Another important consideration is the number of accounts, *riwayahs*, we have of any one report. A third factor is the earliest confirmed source of an account, which may be attributed directly to the Prophet, to a Companion, or to a member of the next generation of the Muslims after them, known as the *tabi'un*, or followers.

Our first order of classification, then, concerns reliability. Here we have three categories, *sahih* (sound), *hassan* (good), and *da'if* (weak). The first of these, a *sahih* hadith, is a report going back to the Prophet, all the narrators of which were people of outstandingly good character, who had excellent memories, and who reported exactly what they heard without interpolations or omissions. There will be no breaks or gaps in the *isnads* of such a hadith and it will not contradict any stronger reports.[6] The second degree of reliability is known as *hassan* (good). This is an account whose original source is unknown, but whose narrators are all sound, reliable people, none of whom has been accused of falsehood. A *hassan* account is accepted by most scholars and may be used as legal evidence to support a ruling.[7] The last degree of reliability is called *da'if* (weak). This falls short of *sahih* and *hassan* accounts on one or more points. For example, a hadith may be declared weak if one of its narrators is a person of questionable character, had a poor memory, or reported what he heard inaccurately. Alternately, it may contain grammatical mistakes, contradict other reports, or contain mysterious breaks or omissions in its isnad.[8] Finally, we should also mention the *mawdu'* or invented hadith. This is

5. ibid. 213.

6. Muhammad ibn Muhammad Abû Shahbah, *al-Wasît fi ᶜulûm wa mustalah al-hadîth*, (Jeddah, 1403/1983), 225-8, 300.

7. ibid. 265-6.

8. ibid. 272.

a false report about the Prophet, about the Companions or about the first generation of the Muslims to come after them.[9]

Beside assessing reliability, scholars also categorize hadiths in other ways. One of these is by the number of accounts, or *riwayahs*, there are of any single report. Here there are only two categories, *mutawatir*, meaning multiple, and *ahad*, meaning solitary. A *mutawatir* hadith comes from several independent sources. Some scholars insist that there must be at least five of these, others require seven, still others require ten or twelve. Each *mutawatir* account serves to confirm the other, and may be used as proof of their mutual and collective reliability. There are two kinds of *mutawatir* hadith. The first includes hadiths that are identical with one another word for word. Within this group only the *isnads* are different. The second includes hadiths that have the same meaning, but are expressed in slightly different ways. The first of these is called *lafzi*, literal, while the second is called *ma'nawi*, semantic.[10] Hadith accounts that fail to satisfy the conditions of *mutawatir* hadith are always catageorized as *ahad* or solitary accounts. There are three sub-classes of *ahad* hadiths, these are called *masshur* (well known), *'aziz* (rare), and *gharib (unusual)*.[11]

Another way scholars assess hadiths is by the earliest person to whom an account can be attributed. Here we have three categories: *marfu'*, taken up—that is to say to the Prophet—*mauquf* stopped, or attributable to a Companion, and finally, *maqtu'*, cut off, that is to say not attributable to anyone before the first generation of the Muslims.[12]

The best known classical sources for hadith criticism are *'Ulum al-hadith* of Ibn al-Salah (d. 643/1235); *al-Taqrib wa 'l-taysîr* of al-Nawawi (d. 676/1277) and the commentary of the same book *Tadrib al-rawi* by al-Suyuti (d. 911/1505); and *Nukhbat al-fikr* of Ibn Hajar al-'Asqalani (d. 852/1448).

For a detailed introduction in English see Muhammad Azami, *Studies in Hadith Methodology and Literature*, (Indianapolis: 1977) and *Studies in Early Hadith Literature*, (Indianapolis: 1979) by the same author.

9. ibid. 319.
10. ibid. 190.
11. ibid. 198.
12. ibid. 204.

Ahmad von Denffer has prepared two very useful bibliographies, *Hadith: A select and annotated guide to materials in the English language*, (Islamic Foundation, Leicester: 1979) and *Literature on Hadith in European Lanugages, A Bibliography* (Islamic Foundation, Leicester: 1981). Both are now somewhat dated but still useful. A cumulative list of sources may be found in the *Index of Islamic Literature*, published quarterly by the Islamic Foundation and the International Institute of Islamic Thought, Hendon, Virginia, USA.

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